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A Practitioner's Guide to Iowa Manure Laws, Manure  
Regulations, and Manure Application Agreements

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# A PRACTITIONER'S GUIDE TO IOWA MANURE LAWS, MANURE REGULATIONS, AND MANURE APPLICATION AGREEMENTS

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## I. INTRODUCTION

The disposing of livestock waste is an important and integral part of any livestock farming operation.<sup>1</sup> In order to obtain the quality meats found in grocery stores, farmers must necessarily feed the livestock and take care of their wastes.<sup>2</sup> Livestock waste has been used as a natural fertilizer on Iowa's fields for the last century with little social or legal discussion, but the last decade has seen rising conflict in regards to manure. In general, this conflict has emerged because of two major events. First, Iowa's citizens have become increasingly more aware of potential environmental issues relating to livestock facilities, such as water quality. Second, agriculture has become more technologically advanced and industrialized, resulting in livestock facilities that are now much larger than they were in the last decade. Farmers, with the aid of technology, can also raise more livestock without needing more employees. The economy has forced many livestock producers to either increase the size of their operations or get out of the livestock business. With the increased conflict that results from larger operations, it is important that attorneys and producers alike be aware of the laws regulating livestock manure.

This Note deals almost exclusively in state law. A prudent attorney or producer should also be aware of federal regulations that may affect livestock production.<sup>3</sup> The following Note is an examination of the laws surrounding livestock waste, including the new changes to Iowa law following the adoption of House File 2494 by the Iowa General Assembly in 1998. This Note will also

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1. In the Iowa Code, "farm operation" is defined as "a condition or activity which occurs on a farm in connection with the production of farm products and includes . . . the treatment or disposal of wastes resulting from livestock . . . ." IOWA CODE § 352.2(6) (1997).

2. This Note shall adopt the definition of manure as found in the Iowa Code. Manure shall mean "animal excreta or other commonly associated wastes of animals, including, but not limited to, bedding, litter, or feed losses." *Id.* § 455B.161(16). Under Iowa law, manure is not hazardous. *See id.* § 455B.411(3)(b)(1). As defined, "[h]azardous waste" does not include . . . [a]gricultural wastes, including manures and crop residues that are returned to the soil as fertilizers or soil conditioners." *Id.*

3. The United States Environmental Protection Agency (EPA) has proposed regulations that would apply to operations raising hogs, cattle, and poultry. *See* George Anthon, *Tougher Farming Regulation Vowed*, DES MOINES REG., Mar. 7, 1998, at 11S. The proposed program would require facilities "with 1,000 cattle, 2,500 hogs and 10,000 chickens to hold EPA waste management permits." *See id.* For smaller operations, the EPA intends to work with the United States Department of Agriculture (USDA) in "developing manure management and disposal plans for regions and even for individual farms." *Id.* The EPA has also requested that the USDA provide financial and technical assistance to farmers in complying with the regulations. *See id.* Although federal regulations are beyond the scope of this Note, an agricultural attorney should be aware of upcoming and significant changes in this area.

examine the requirements for a manure management plan and will make suggestions as to what should be included in a manure application agreement.

## II. IOWA LAW: REGULATION OF MANURE

### A. Background Information

Every animal feeding operation, regardless of size, is subject to severe penalties if the waters of the state are polluted by that operation.<sup>4</sup> However, it must be stated at the outset that Iowa law regulating manure differentiates based on the type of operation.<sup>5</sup> The three main types of operations are: animal feeding operations, confinement feeding operations, and open feedlots.<sup>6</sup> The specific rules that an operation must abide by depends on its classification. Therefore, it is important for operators to know how their operations are classified. An animal feeding operation is defined as "a lot, yard, corral, building, or other area in which animals are confined and fed and maintained for 45 days or more in any 12-month period, and all structures used for the storage of manure from animals in the operation."<sup>7</sup> A confinement feeding operation includes "an animal feeding operation in which animals are confined to areas which are totally roofed."<sup>8</sup> Finally, an open feedlot includes "an unroofed or partially roofed animal feeding operation in which no crop, vegetation, or forage growth or residue cover is maintained during the period that animals are confined in the operation."<sup>9</sup> In summary: (1) an animal feeding operation would include both open feedlots and confinement feeding operations; (2) a confinement feeding operation must be totally roofed; and (3) an open feedlot must be at least partially unroofed and does not include pastures.

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4. See, e.g., IOWA CODE § 455B.191(7)(d) (1997). It is a violation to operate [A] confinement feeding operation, including a confinement feeding operation structure or anaerobic lagoon which is part of a confinement feeding operation, or a related pollution control device or practice, which causes pollution to the waters of the state, if the pollution was caused intentionally, or caused by a failure to take measures required to abate the pollution which resulted from an act of God.

*Id.* If a water of the state is polluted, a violator is subject to a penalty of up to \$5000 per day. See *id.* § 455B.191(1). A habitual violator may be assessed a fine of up to \$25,000 per day. See *id.* § 455B.191(7).

5. See IOWA ADMIN. CODE r. 567-65.1 (1997).

6. See *id.*

7. *Id.*

8. *Id.*

9. *Id.*

### B. Laws Protecting Iowa's Waters from Manure Application

Iowa law specifically protects the water of the state from manure by prohibiting a livestock operation from polluting any of the state's waters.<sup>10</sup> Iowa Code section 159.27 also directs the Department of Natural Resources (DNR) to "adopt rules relating to the disposal of manure" when that manure is "in close proximity to a designated area."<sup>11</sup> This section specifically directs the DNR to protect areas of water that typically are of most concern, including drinking water.<sup>12</sup> A designated area is defined as "a known sinkhole, or a cistern, abandoned well, unplugged agricultural drainage well, agricultural drainage well surface inlet, drinking water well, or lake, or a farm pond or privately owned lake . . . ."<sup>13</sup> Manure may not be applied to cropland that is within two hundred feet of a designated area unless: "the manure is applied by injection or incorporation within twenty-four hours following the application" or "an area of permanent vegetation cover exists" fifty feet around the designated area, and the portion under permanent vegetation is not subject to any manure application.<sup>14</sup>

These regulations are enforced by the DNR. The DNR may inspect and evaluate any animal feeding operation in the state to determine if the operation: (1) is discharging manure into a water of the state without minimum manure control; (2) is reasonably expected to be causing pollution of a water of the state; or (3) is reasonably expected to be causing a violation of state water quality standards.<sup>15</sup> If any of these three conditions exists, then the operation must apply for an operation permit, and the DNR will institute "necessary remedial actions to eliminate the conditions" but only after the operation is given written notification that describes the need to correct the condition.<sup>16</sup>

If a livestock producer is in need of financial assistance to help protect the state's water, assistance is available through Iowa's incentive program. Iowa Code section 161C.6 establishes an organic nutrient management program that provides financial incentives and assistance for farmers to prevent manure runoff from contaminating any water resources in the state, and to assist farmers in fully

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10. *See id.*

11. IOWA CODE § 159.27 (1997).

12. *See id.*

13. *Id.* A designated area does not include a terrace tile inlet. *See id.*

14. *Id.* § 159.27(1), (2). For additional rules as to separation distances from bodies of water in Iowa, see *infra* Part II.D.

15. *See* IOWA ADMIN. CODE r. 567-65.4(1)(a)-(c) (1997).

16. *Id.* r. 567-65.4(2). The operation that is required to apply for a permit under these circumstances must do so within 90 days of the written notice. *See id.* r. 567-65.5(5). However, the operation may continue operating until such time as when, or if, the permit is denied. *See id.* r. 567-65.5(6).

utilizing manure as a source of soil nutrients.<sup>17</sup> The state will contribute approximately fifty percent of a farmer's cost, up to \$7500 per year.<sup>18</sup>

Livestock producers and their attorneys should be aware of agriculture's responsibility for protecting the state's waters from possible contamination by manure. Iowa law places a legal responsibility upon producers to take care not to pollute the waters, in addition to the informal stewardship responsibilities that have always come with owning farmland.

### C. Minimum Manure Control

Iowa law sets forth a minimum level of manure control by which every operation must abide.<sup>19</sup> First, "manure from an animal feeding operation shall be disposed in a manner which will not cause surface water or groundwater pollution. Disposal in accordance with the provisions of state law . . . shall be deemed as compliance with this requirement."<sup>20</sup> Second, additional requirements are placed on confinement feeding operations, in that they must "retain all manure produced by the operation between periods of manure disposal."<sup>21</sup> Confinement feeding

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17. See IOWA CODE § 161C.6(2) (1997). Only farmers are eligible for this program. Iowa Code § 161C.6(2)(b) states:

A person shall not be eligible to participate in the program, unless the person is an individual family farmer, an individual actively engaged in farming as provided in section 9H.1, subsection 1, paragraphs 'a' through 'c', or the person is a family farm corporation, family farm limited partnership, a family trust, or a family farm limited liability company, all as defined in section 9H.1.

*Id.* § 161C.6(2)(b).

18. See *id.* § 161C.6(2)(c), (g). This cost share program will pay the lesser of fifty percent of the "estimated cost of establishing the system" or fifty percent of the actual cost. *Id.* The money from this program may not be used by any person who is "a party to a legal or administrative action, including a contested case proceeding under chapter 17A, which relates to an alleged violation of chapter 455B involving the disposal of livestock waste, until the action is resolved." *Id.* § 161C.6(2)(e). Furthermore, the money from the cost share program may not be used for the payment of a civil penalty or fine, nor may it be used to remedy a contamination that has already occurred. See *id.* § 161C.6(2)(f).

19. See *id.* § 455B.201. For a clear and complete summary of Iowa law as it relates to livestock, see CHRISTINA L. GAULT & ELDON L. MCAFEE, IOWA FARM BUREAU FED'N & IOWA PORK PRODUCERS ASS'N, IOWA LIVESTOCK ENVIRONMENTAL REGULATIONS (1997). This handbook was additionally sponsored by: Iowa Cattlemen's Association, Iowa Corn Growers Association, Iowa Dairy Products Association, Iowa Poultry Association and Iowa Soybean Association. The handbook is intended by the authors "as education[al] material to assist livestock producers . . . in understanding the effect of various environmental laws on livestock production." *Id.* at verso.

20. IOWA CODE § 455B.201(2) (1997). "State law" in this section refers to chapter 455B, guidelines adopted pursuant to the Iowa Code and section 159.27. See *id.*

21. *Id.* § 455B.201(1).

operations may not "discharge manure directly into water of the state or into a tile line that discharges directly into water of the state."<sup>22</sup>

Additional explanation of the law's minimum manure control requirements and guidelines may be found in Chapter 65 of the Iowa Administrative Code.<sup>23</sup> For all animal feeding operations, the minimum level of manure control "shall be the removal of settleable solids from the manure prior to discharge into a water of the state."<sup>24</sup> Further, no direct discharge is allowed into agricultural drainage wells, sinkholes, or publicly owned lakes.<sup>25</sup> For all animal feeding operations, manure removed from the facilities must be "land applied in a manner which will not cause surface or groundwater pollution."<sup>26</sup>

If an open feedlot is large enough to require a permit, additional standards must be met. Minimum manure control for a *permitted* open feedlot includes "the retention of all manure flows from the feedlot areas and all other manure-contributing areas resulting from the 25-year, 24-hour precipitation event."<sup>27</sup> Open feedlots that comply with appendix A of the Iowa Administrative Code (dealing with manure control alternatives for open feedlots) are deemed to be in compliance with this rule, "unless discharges from the manure control facility cause a violation of state water quality standards."<sup>28</sup>

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22. *Id.*

23. *See, e.g.,* IOWA ADMIN. CODE r. 567-65.2(1) (1997).

24. *Id.* The settleable solids may be removed "by use of solids-settling basins, terraces, diversions, or other solid-removal methods." *Id.* r. 567-65.2(1)(a). The removal of settleable solids is obtained when

[T]he velocity of manure flows has been reduced to less than 0.5 foot per second for a minimum of five minutes. Sufficient capacity shall be provided in the solids-settling facilities to store settled solids between periods of manure application and to provide required flow-velocity reduction for manure flow volumes resulting from precipitation events of less intensity than the ten-year, one-hour frequency event. Solids-settling facilities receiving open feedlot runoff shall provide a minimum of 1 square foot of surface area for each 8 cubic feet of runoff per hour resulting from the ten-year, one-hour frequency-precipitation event.

*Id.* r. 567-65.2(1)(b).

25. *See id.* r. 567-65.2(6).

26. *Id.* r. 567-65.2(7). If the manure is applied according to the rules and guidelines set out in Chapter 56 of the Iowa Administrative Code, the application shall be deemed as being in compliance with the requirement that the application not cause surface or groundwater pollution. *See id.*

27. *Id.* r. 567-65.2(2).

28. *Id.* If a violation of water quality standards takes place, "the department may impose additional manure control requirements upon the feedlot . . . ." *Id.* This section also provides that control of manure may be obtained by "use of manure-retention basins, terraces, or other runoff control methods. Diversion of uncontaminated surface

Minimum manure control for *confinement* feeding operations includes the following:

[T]he retention of all manure produced in the confinement enclosures between periods of manure application. In no case shall manure from a confinement feeding operation be discharged directly into a water of the state or into a tile line that discharges to waters of the state. A confinement feeding operation that is required to submit a manure management plan to the department . . . shall not apply manure in excess of the nitrogen use levels necessary to obtain optimum crop yields.<sup>29</sup>

Confinement operations must have enough capacity to store all manure from the facility between periods of manure application.<sup>30</sup> The manure in the storage area must be removed "as necessary to prevent overflow or discharge of manure."<sup>31</sup>

It is important to recognize that the DNR has the ability to require more stringent or less stringent "minimum manure controls" for all animal feeding operations in addition to the regulations previously discussed. On a case-by-case basis, the DNR may determine that more or less controls are needed.<sup>32</sup> The administrative regulations state that "[i]f site topography, operation procedures, experience, or other factors indicate that a greater or lesser level of manure control than that specified . . . is required to provide an adequate level of water pollution control for a specific animal feeding operation, the department may establish different minimum manure control requirements for that operation."<sup>33</sup>

This section has explained the minimum manure control responsibilities which are placed upon a livestock producer via the Iowa Code and Iowa Administrative Code. The minimum responsibilities are just the beginning of what is needed. Most producers will want to take special note of Part II.E.4 of this Note

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drainage prior to contact with feedlot or manure-storage areas may be required. Manure-solids-settling facilities shall precede the manure-retention basins or terraces." *Id.*

29. *Id.* r. 567-65.2(3).

30. *See id.* r. 567-65.2(3)(a). The confinement feeding operation must have additional capacity if other sources, besides manure (such as precipitation), can enter the manure storage area. *See id.*

31. *Id.* r. 567-65.2(3)(b). Manure contained in an earthen manure storage structure, including anaerobic lagoons, earthen manure storage basins, or earthen waste slurry storage basins, must maintain a minimum of two feet of freeboard in the structure, "unless a greater level of freeboard is required to maintain the structural integrity of the structure or prevent manure overflow." *Id.* Manure contained in an unroofed, formed manure storage structure must be removed from the structure "as necessary to maintain a minimum of one foot of freeboard in the structure unless a greater level of freeboard is required to maintain the structural integrity of the structure or prevent manure overflow." *Id.*

32. *Id.* r. 567-65.2(4).

33. *Id.*

because it is likely that many of the state's "recommendations" may become law in 1999.<sup>34</sup>

#### D. Separation Distances<sup>35</sup>

Many separation distance requirements and manure application requirements depend on the type of structure the manure is stored in prior to application. The main types of manure storage structures include: aerobic structures, anaerobic lagoons, earthen manure storage basins, earthen waste slurry storage basins, runoff control basins, and formed manure storage structures. It is important to understand the differences between these types of structures. An aerobic structure is one that uses air or oxygen and aeration equipment.<sup>36</sup> An anaerobic lagoon is a structure that receives manure on a regular basis, and the biological activity is anaerobic, as opposed to aerobic.<sup>37</sup> An earthen manure storage basin is an earthen cavity that receives manure on a regular basis and which is completely emptied at least once each year.<sup>38</sup> An earthen waste slurry storage

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34. See *infra* Part II.E.4.

35. For all separation distances mentioned in this Note, the method for measuring the separation distances may be found in the Iowa Administrative Code regulation 567-65.10 (1997). A simplified explanation for these measurements is that the distances are measured horizontally from the closest point of the objects being measured. However, the rules should be consulted for a more detailed analysis. See generally IOWA ADMIN. CODE r. 567-65.10 (1997) (outlining how these distances are determined).

36. See *id.* r. 567-65.1. An aerobic structure is more specifically defined as: "an animal feeding operation structure other than an egg washwater storage structure which employs bacterial action which is maintained by the utilization of air or oxygen and which includes aeration equipment." *Id.*

37. See *id.* An anaerobic lagoon is defined as:

[A]n impoundment used in conjunction with an animal feeding operation, if the primary function of the impoundment is to store and stabilize organic wastes, the impoundment is designed to receive wastes on a regular basis, and the impoundment's design waste loading rates provide that the predominant biological activity is anaerobic. An anaerobic lagoon does not include any of the following: (1) A confinement feeding operation structure; (2) A runoff control basin which collects and stores only precipitation-induced runoff from an animal feeding operation in which animals are confined to areas which are unroofed or partially roofed and in which no crop, vegetation, or forage growth or residue cover is maintained during the period in which animals are confined in the operation; (3) An anaerobic treatment system which includes collection and treatment facilities for all off gases.

*Id.*

38. See *id.* More precisely, the term is defined as: "an earthen cavity, either covered or uncovered, which, on a regular basis, receives manure discharges from a

basin includes an uncovered earthen cavity that receives manure on a regular basis but which is completely emptied at least twice each year.<sup>39</sup> A formed manure storage structure stores manure, and has walls and a floor made of steel, wood, concrete, concrete block, or other similar materials, that has the structural integrity to hold the pressure of the manure.<sup>40</sup> A runoff control basin collects and stores runoff from open feedlots.<sup>41</sup>

The siting of anaerobic lagoons and earthen waste slurry storage basins is specifically regulated by Iowa law.<sup>42</sup> For smaller operations<sup>43</sup> having anaerobic lagoons, uncovered earthen manure storage basins, or uncovered formed manure storage structures, the minimum separation distance from a residence,<sup>44</sup> commercial enterprise, religious institution, educational institution, or public use area is 1250

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confinement feeding operation if accumulated manure from the basin is completely removed at least once each year." *Id.*

39. *See id.* These structures must be issued a permit. *See id.* The more detailed definition is "an uncovered and exclusively earthen cavity which, on a regular basis, receives manure discharges from a confinement animal feeding operation if accumulated manure from the basin is completely removed at least twice each year and which was issued a permit . . . ." *Id.*

40. *See id.*

'Formed manure storage structure' means a structure, either covered or uncovered, used to store manure from a confinement feeding operation, which has walls and a floor constructed of concrete, concrete block, wood, steel, or similar materials. Similar materials may include, but are not limited to, plastic, rubber, fiberglass, or other synthetic materials. Materials used in a formed manure storage structure shall have the structural integrity to withstand expected internal and external load pressures.

*Id.*

41. *See id.*

42. The separation distances in this Note apply to new construction or expansion only. *See* IOWA CODE § 455B.134(3)(f) (1997). Those operations which were constructed before the livestock bill, House File 2494, in 1998 have been grandfathered exceptions to these requirements. *See id.*

43. Although the debate as to what is a "smaller" operation continues, this Note will consider a smaller operation to be one that is exempt from permit requirements, or less than 1.6 million live weight of beef cattle, or less than 625,000 live animal weight of animals other than beef cattle. *See also* IOWA CODE § 455B.134(3)(f) (1997). The author recognizes that these numbers are arbitrary, and that a hog operation of 650,000 pounds may still be considered to be "small" by some while an operation of 600,000 pounds may seem "large" to others. Note, however, that the Iowa Code uses "small animal feeding operation" in some circumstances to mean "an animal feeding operation which has an animal weight capacity of two hundred thousand pounds or less for animals other than bovine, or four hundred thousand pounds or less for bovine." *Id.* § 455B.161(19).

44. This applies only to residences "not owned by the owner of the animal feeding operation." Act of May 21, 1998, ch. 1209, § 16, 1998 Iowa Acts 658, 665 (to be codified at IOWA CODE § 455B.162(1A)).

feet.<sup>45</sup> For smaller operations with covered earthen manure storage basins or covered formed manure storage structures, the separation distance must be at least 1000 feet.<sup>46</sup> For the moderate category of operations<sup>47</sup> having anaerobic lagoons or uncovered earthen manure storage basins, the minimum separation distance is 1875 feet.<sup>48</sup> For moderate operations having uncovered formed manure storage structures, the minimum separation distance is 1500 feet.<sup>49</sup> For moderate operations with covered earthen manure storage basins or covered formed manure storage structures, the minimum separation distance must be 1250 feet.<sup>50</sup> For a larger operation<sup>51</sup> having an anaerobic lagoon or uncovered earthen manure storage basin, the separation distance from a residence, commercial enterprise, religious or educational institution must be 2500 feet.<sup>52</sup> For uncovered formed manure storage structures, the minimum distance is 2000 feet.<sup>53</sup> For covered earthen manure storage basins and covered formed manure storage structures, the minimum is 1875 feet.<sup>54</sup> Separation distances for public use areas<sup>55</sup> are treated differently in the Iowa

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45. See *id.*, 1998 Iowa Acts at 665. A livestock producer may not expand its anaerobic lagoon or earthen basin closer to a residence not owned by the producer or owner, unless the neighbor specifically signs and records a written agreement, waiving the separation distances as required under this code section. See also IOWA CODE § 455B.134(3)(f) (1997).

46. See *id.*, 1998 Iowa Acts at 665. Confinement buildings and egg washwater storage structures for smaller operations must also be sited at least 1000 feet from a residence, commercial enterprise, religious institution, or educational institution. See *id.*, 1998 Iowa Acts at 665.

47. This Note uses "moderate" to describe the category of operations "having an animal weight capacity of 625,000 or more pounds but less than 1,250,000 pounds for animals other than bovine, or 1,600,000 or more pounds but less than 4,000,000 pounds for bovine." *Id.*, 1998 Iowa Acts at 665.

48. See *id.*, 1998 Iowa Acts at 665.

49. See *id.*, 1998 Iowa Acts at 665.

50. See *id.*, 1998 Iowa Acts at 665. Moderate confinement buildings must be 1250 feet from residences, commercial enterprises, religious or educational institutions (RCREs). See *id.*, 1998 Iowa Acts at 665. Egg washwater storage structures must have at least 1000 feet of distance. See *id.*, 1998 Iowa Acts at 665.

51. The author considers a "larger" operation to mean one that requires a permit and which has a "capacity of 1,250,000 or more pounds for animals other than bovine, or 4,000,000 or more pounds for bovine." See *id.*, 1998 Iowa Acts at 665.

52. See *id.*, 1998 Iowa Acts at 665.

53. See *id.*, 1998 Iowa Acts at 665.

54. See *id.*, 1998 Iowa Acts at 665. This distance was increased in 1998 from 1250 feet. Compare IOWA CODE § 455B.162(1)(a) (1997), with Act of May 21, 1998, ch. 1209, § 16, 1998 Iowa Acts 658, 664. Larger confinement buildings also must be 1850 feet from RCREs, and egg washwater storage structures must be 1500 feet from RCREs. See *id.*, 1998 Iowa Acts at 665.

55. A public use area is defined as "a portion of land . . . with facilities which attract the public to congregate and remain in the area for significant periods of time . . ." *Id.* § 13, 1998 Iowa Acts at 663 (to be codified at IOWA CODE § 455B.161(17)(a)).

Code. For smaller animal feeding operations, the minimum distance must be 1250 feet.<sup>56</sup> For moderate operations, the minimum for all feeding structures is 1875 feet, and for larger operations, for all structures, the minimum is 2500 feet.<sup>57</sup>

In legislation passed in 1998, the state imposed additional regulations upon livestock producers in regards to bodies of water.<sup>58</sup> An animal feeding operation structure may not be constructed closer than five hundred feet from a major water source, such as "a surface intake, wellhead, or cistern of an agricultural drainage well or known sinkhole."<sup>59</sup> An animal feeding operation structure may not be constructed closer than two hundred feet from a watercourse.<sup>60</sup> In addition, unformed manure storage structures may not be constructed or expanded *at all* within agricultural drainage well areas.<sup>61</sup> The separation distances for structures do not apply to farm ponds or privately owned lakes,<sup>62</sup> and do not apply if the manure storage structure is "constructed with a secondary containment barrier" as provided by the DNR.<sup>63</sup>

Liquid manure may not be applied to land benefiting from a separation distance requirement unless one of the following exceptions apply: (1) the manure is injected or incorporated within twenty-four hours; (2) the person benefiting from the separation distance waives this benefit in writing; (3) the operation is less than 200,000 pounds of animals other than bovine; or (4) if using spray irrigation equipment, a center pivot system is used, the hoses spray downward no more than 9 feet above the soil and no more than 25 pounds per square inch, and if it is never

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This definition was also specifically changed in 1998 to include cemeteries within public use areas. *See id.*, 1998 Iowa Acts at 663 (to be codified at IOWA CODE § 455B.161(17)(b)). A cemetery is specifically defined as "a space held for the purpose of permanent burial, entombment, or interment of human remains that is owned or managed by a political subdivision or private entity regulated pursuant to chapter 523I or 566A." *Id.* § 12, 1998 Iowa Acts at 662-63 (to be codified at IOWA CODE § 455B.161(5A)).

56. *See id.* § 16, 1998 Iowa Acts at 666 (to be codified at IOWA CODE § 455B.162(1B)).

57. *See id.*, 1998 Iowa Acts at 666.

58. *See id.* § 35, 1998 Iowa Acts at 676 (to be codified at IOWA CODE § 455B.204).

59. *Id.*, 1998 Iowa Acts at 676 (to be codified at IOWA CODE § 455B.204(2)(a), (d)).

60. *See id.*, 1998 Iowa Acts at 676 (to be codified at IOWA CODE § 455B.204(2)(c)).

61. *See id.*, 1998 Iowa Acts at 676 (to be codified at IOWA CODE § 455B.204(5)).

62. *See id.*, 1998 Iowa Acts at 676 (to be codified at IOWA CODE § 455B.204(3)(a)).

63. *See id.*, 1998 Iowa Acts at 676 (to be codified at IOWA CODE § 455B.204(3)(b)).

applied within 250 feet from a residence, commercial enterprise, religious or educational institution or public use area.<sup>64</sup>

At one time, separation distances were important only for the siting of livestock operations. This is not the case any longer. The changes in the law in 1998 require that liquid manure also not be applied in the separation distance space, unless a livestock producer can fit into an exception. Therefore, it is especially important that producers and attorneys are aware of an operation's classification, what type of manure structure the operation has, and the type of public-type areas in the producer's neighborhood that the producer should be concerned about. In many situations, the spreading of manure near a residence or public-type area is now not only unneighborly, it is unlawful.

### *E. Manure Application*

#### *1. Applicator Certification*

The 1998 livestock bill requires that commercial manure applicators and applicators of manure from confinement feeding operations<sup>65</sup> become certified before applying manure to any Iowa lands.<sup>66</sup> The DNR will develop rules that will provide for the education of manure applicators and the testing of the applicators' knowledge.<sup>67</sup> The DNR will certify manure applicators by providing "standards

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64. See *id.* § 21, 1998 Iowa Acts at 668 (to be codified at IOWA CODE § 455B.165(6)).

65. Only applicators for confinement feeding operations of over 200,000 pounds must be certified. See *id.* § 26, 1998 Iowa Acts at 669 (to be codified at IOWA CODE § 455B.200A(1)) (exempting small animal feed operations from the permit requirements); see also IOWA CODE § 455B.161(19) (1997) (defining a "small animal feeding operation" as an "operation which has an animal weight capacity of two hundred thousand pounds or less for animals other than bovine . . ."). Not all animal feeding operation applicators require certification, only confinement feeding operations. See *id.* § 33, 1998 Iowa Acts at 674 (to be codified at IOWA CODE § 455B.203A).

66. See *id.* § 33, 1998 Iowa Acts at 674 (to be codified at IOWA CODE § 455B.203A(2)). The livestock bill takes effect January 1, 1999. See *id.* § 53, 1998 Iowa Acts at 681. However, "a person shall not be required to be certified as a commercial manure applicator or a confinement site manure applicator . . . for sixty days following the effective date . . ." *Id.* § 47, 1998 Iowa Acts at 680.

67. See *id.* § 33, 1998 Iowa Acts at 674 (to be codified at IOWA CODE § 455B.203A(4)). Commercial manure applicators will be required to complete the initial course, and then either take a test each year or attend a three-hour continuing education course each year. See *id.*, 1998 Iowa Acts at 674 (to be codified at IOWA CODE § 455B.203A(3)(a)). Non-commercial manure applicators will be required to complete an initial course, and then either take a test every three years, or take a two-hour instructional course each year. See *id.*, 1998 Iowa Acts at 674 (to be codified at IOWA CODE § 455B.203A(3)(a)). Both classes of applicators may be required to pay a fee for

for the handling, application, and storage of manure, the potential effects of manure upon surface water and groundwater, and procedures to remediate the potential effects on surface water or groundwater.”<sup>68</sup> Persons exempt from the certification include: (1) persons actively engaged in farming who are trading work with another person actively engaged in farming; (2) persons employed by a person actively engaging in farming, whose duties only incidentally include the application of manure; (3) persons who apply manure only as an incidental part of a custom farming operation; or (4) as the DNR rules allow.<sup>69</sup>

If taught and administered well, these manure application education courses can be a great asset to producers in that they could learn more about the effects manure has upon Iowa’s soil, air, and water. Additionally, this certification program could help to assure the public that manure is being applied correctly and safely. However, if the program does not teach the producers any new useful information, it could be a waste of time and resources. Only time will tell whether this new program will be a great benefit or just a burden.

## 2. *Spray Irrigation of Manure*

The application of manure by spray irrigation<sup>70</sup> is heavily regulated under Iowa law. The law states that “[a] person shall not apply manure by spray irrigation equipment, except as provided by rules which shall be adopted by the department . . . .”<sup>71</sup>

The DNR has adopted rules regarding the spray irrigation of manure that are found in the Iowa Administrative Code.<sup>72</sup> The first and minimum requirement is that the application of manure by spray irrigation must be applied “in a manner

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the certification. *See id.*, 1998 Iowa Acts at 675 (to be codified at IOWA CODE § 455B.203A(6)(a)).

68. *Id.*, 1998 Iowa Acts at 674 (to be codified at IOWA CODE § 455B.203A(4)).

69. *See id.*, 1998 Iowa Acts at 675 (to be codified at IOWA CODE § 455B.203A(5)). The DNR will be developing rules in the coming months following the legislative session. *See generally id.* § 34, 1998 Iowa Acts at 675-76 (to be codified at IOWA CODE 455B.203B(1)) (requiring the DNR to adopt manure application rules). There are also certain exceptions for those who are under direct supervision of another person who is certified. *See id.* § 33, 1998 Iowa Acts at 675 (to be codified at IOWA CODE § 455B.203A(5)(a)(2)). Direct supervision means physically present and within sight or hearing distance from the applicator. *See id.*, 1998 Iowa Acts at 675.

70. Spray irrigation equipment is defined in the Iowa Administrative Code as “mechanical equipment used for the aerial application of manure which receives manure from the storage structure during application via hoses or piping and which is a type of equipment which may also be customarily used for artificial application of water to aid the growing of general farm crops.” IOWA ADMIN. CODE r. 567-65.1 (1997).

71. IOWA CODE § 455B.201(4) (1997).

72. *See* IOWA ADMIN. CODE r. 567-65.2(10) (1997).

which will not cause surface water or groundwater pollution.”<sup>73</sup> The second requirement regarding spray irrigation equipment is that the equipment must be operated so as not to cause runoff of the manure onto property adjoining the land being sprayed.<sup>74</sup> The third requirement requires that a minimum distance of a hundred feet lies between the wetted perimeter<sup>75</sup> of the manure and the property adjacent to the land being sprayed.<sup>76</sup>

The fourth set of requirements regarding spray irrigation equipment is more complicated. It involves the minimum separation distances from the manure to any residence, commercial enterprise, bona fide religious institution, educational institution or public use area. The minimum distance required depends on the type of operation and its type of manure structure. It is important to note, however, that if the residence, commercial enterprise, bona fide religious institution, educational institution or public use area was established or expanded after the animal feeding operation began using spray irrigation equipment, the separation distances do not apply.<sup>77</sup>

If the manure to be applied comes from an “earthen waste slurry storage basin, earthen manure storage basin, or formed manure storage structure,” then the minimum distance between any of the above uses and the manure must be one thousand feet.<sup>78</sup> However, if the manure is incorporated into the soil within twenty-four hours, the minimum distance only must be five hundred feet.<sup>79</sup> Additionally, if the manure is only applied once per calendar year for less than four days during a consecutive week, the minimum distance must only be five hundred feet.<sup>80</sup>

If the manure to be applied comes from the first or second cells of an anaerobic lagoon, then the minimum distance between the above uses and the manure must be 750 feet.<sup>81</sup> If the manure is incorporated within twenty-four hours or if the manure is applied only once per year for less than four days in one

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73. *Id.* If the person applying the manure by spray irrigation equipment follows “the provisions of state law, and the rules and guidelines in [Chapter 65],” they are deemed to be in compliance with the minimum manure control requirement. *Id.*

74. *See id.* r. 567-65.2(10)(b). The application rate and timing of the application are to be taken into consideration in order to prevent runoff. *See id.*

75. Wetted perimeter is defined in the Iowa Administrative Code as “the outside edge of land where the direct discharge of manure occurs from spray irrigation equipment.” *Id.* r. 567-65.1.

76. *See id.* r. 567-65.2(10)(c). If the wind speed and wind direction or other conditions cause the minimum one hundred feet to be violated, then under no circumstances shall the wetted perimeter exceed the property boundary. *See id.*

77. *See id.* r. 567-65.2(10)(d)(4).

78. *Id.* r. 567-65.2(10)(d)(1)(1).

79. *See id.* r. 567-65.2(10)(d)(2).

80. *See id.* r. 567-65.2(10)(d)(3).

81. *See id.* r. 567-65.2(10)(d)(1)(2).

consecutive week, the minimum distance only needs to be five hundred feet.<sup>82</sup> If the manure to be applied comes from the third cell of an anaerobic lagoon or a runoff control basin,<sup>83</sup> then the minimum distance from the above uses and the manure must be at least five hundred feet.<sup>84</sup>

The fifth requirement regarding spray irrigation equipment involves the type of equipment used. If the equipment uses "hoses which discharge the manure at a maximum height of 9 feet and in a downward direction, and spray nozzles with a pressure of 25 pounds per square inch or less," there must be a separation distance of 250 feet from a residence, commercial institution, bona fide religious institution, educational institution, or public use area.<sup>85</sup>

Separation distances for spray irrigation equipment may be waived by the property owner, likely the nearest neighbor, who has the benefit of the separation distance.<sup>86</sup> The waiver must be in writing and recorded in order for the separation distance requirement to be inapplicable.<sup>87</sup> Variances to separation distances may also be granted by the DNR under limited circumstances.<sup>88</sup>

Finally, the 1998 livestock bill imposed an additional requirement for producers who use spray irrigation. Spray irrigation that is "restricted" must be diluted before it is applied.<sup>89</sup> Restricted spray irrigation equipment is equipment that "disperses manure through an orifice at a rate of eighty pounds per square inch or more."<sup>90</sup> Rules regarding these changes in the law will be forthcoming from the DNR.<sup>91</sup>

### 3. *Ground Application of Manure: Iowa Code*

Prior to 1998, the Iowa Code had no specific requirements for the application of manure except those applicable to spray irrigation equipment and the requirement that a water of the state may not be polluted. Instead, the manure application rules came only from the Iowa Administrative Code.<sup>92</sup> The livestock

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82. See *id.* r. 567-65.2(10)(d)(2)-(3).

83. Runoff control basin is defined as "an impoundment designed and operated to collect and store runoff from an open feedlot." *Id.* r. 567-65.1.

84. See *id.* r. 567-65.2(10)(d)(1).

85. *Id.* r. 567-65.2(10)(d)(5).

86. See *id.* r. 567-65.2(10)(e).

87. See *id.*

88. See *id.* r. 567-65.2(10)(f).

89. See Act of May 21, 1998, ch. 1209, § 34, 1998 Iowa Acts 658, 676 (to be codified at IOWA CODE § 455B.203B(2)).

90. See *id.* § 22, 1998 Iowa Acts at 669 (to be codified at IOWA CODE § 455B.171(23A)).

91. See IOWA CODE § 455A.6(6)(a) (1997) (granting DNR authority to promulgate rules necessary for effective administration of Code sections).

92. See IOWA ADMIN. CODE r. 567-65.2 (1997).

bill adopted in 1998 now requires injection or incorporation of liquid manure from a confinement operation within twenty-four hours if the application is within 750 feet of a residence, commercial enterprise, religious or educational institution, or public use area.<sup>93</sup>

4. *Administrative Recommendations for Manure Application*

Although most of the regulations in this section are currently only recommendations from the DNR, the new 1998 livestock bill requires that the DNR:

[A]dopt rules governing the application of manure originating from an anaerobic lagoon or aerobic structure which is part of a confinement feeding operation. The rules shall establish application rates and practices to minimize groundwater and surface water pollution resulting from application, including pollution caused by runoff or other manure flow resulting from precipitation events. The rules shall establish different application rates and practices based on the water holding capacity of the soil at the time of the application.<sup>94</sup>

Producers and attorneys should expect that many of the following recommendations will become rules over the next year. To date, however, the DNR has adopted the following series of recommended measures.

The DNR states that nitrogen application from "all sources" should not exceed the amount necessary "to obtain optimum crop yields for the crop being grown."<sup>95</sup> The manure applicator will need to take into consideration nitrogen from sources such as commercial fertilizers, legumes and manure.<sup>96</sup> The stated purpose for this recommendation is to minimize the nitrogen's potential groundwater leaching or its runoff into surface waters.<sup>97</sup> The same basic recommendation also applies for phosphorous, in that manure should only be applied "at rates equivalent to crop uptake when soil tests indicate adequate phosphorous levels."<sup>98</sup>

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93. See *id.* §§ 16, 21, 1998 Iowa Acts at 666, 668 (to be codified at IOWA CODE §§ 455B.162(1D), 455B.165(6)).

94. *Id.* § 34, 1998 Iowa Acts at 675-76 (to be codified at IOWA CODE § 455B.203B(1)).

95. IOWA ADMIN. CODE r. 567-65.2(11)(a) (1997).

96. See *id.*

97. See *id.*

98. *Id.* r. 567-65.2(11)(b).

The DNR also recommends that, whenever possible, manure should not be applied to frozen or snow-covered crop land.<sup>99</sup> If manure must be applied to frozen or snow-covered cropland, then the manure application must be limited to areas where land slopes are less than four percent or adequate soil erosion control practices exist.<sup>100</sup>

If the land to which the manure is being applied is subject to flooding more than once every ten years, then it is recommended that the manure be incorporated into the soil after the application, and also recommended that the manure not be spread on the area subject to flooding while the ground is snow-covered or frozen.<sup>101</sup> If the manure is to be applied to an area that has more than a ten percent slope, then adequate soil erosion practices should exist, *and* the manure should be incorporated when possible.<sup>102</sup> The last of the recommendations is that if the land to which manure is to be applied is within two hundred feet of a stream and draining into a stream (or surface intake of tile line), then the manure should be injected or incorporated, *and* adequate erosion controls should exist.<sup>103</sup>

As mentioned previously, although the Iowa Administrative Code classifies these rules as "recommendations" for manure application, a producer should take special note of this section because it is possible that many of these recommendations will become law or, at the least, will be used to decide whether a farmer is using generally accepted management practices.

#### F. Manure Management Plans

Manure management plans (MMPs) are creatures of the 1990s and came into existence after concerns began to arise over the proper application of manure onto crop land. The first legal requirement for an MMP came from House File 519, a 1995 farm bill.<sup>104</sup> The general purpose of an MMP is to ensure that the livestock producer has enough land or has arranged to apply on others' lands to safely spread the manure upon crop land.<sup>105</sup> Additionally, the plans are intended to encourage livestock producers to calculate the amount of natural fertilizer going into the soil, so that the producer applies less commercial fertilizer to the soil.<sup>106</sup> The following section will explore the requirements for MMPs as required by law.

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99. See *id.* r. 567-65.2(11)(c).

100. See *id.* Adequate erosion control practices is defined to include "terraces, conservation tillage, cover crops, contour farming or similar practices." *Id.*

101. See *id.* r. 567-65.2(11)(d).

102. See *id.* r. 567-65.2(11)(f).

103. See *id.* r. 567-65.2(11)(e).

104. See Act of May 31, 1995, ch. 195, 1995 Iowa Acts 497.

105. See generally *id.* § 25, 1995 Iowa Acts at 508-09 (outlining the requirements for an MMP).

106. See generally *id.*, 1995 Iowa Acts at 508-09 (outlining the requirements for an MMP).

Because the law in this area has changed so recently, it must be pointed out that the administrative regulations have not yet been written for the 1998 livestock bill. This section is written with the assumption that the old regulations will continue to be in effect, with changes made only where there is a conflict with the new Iowa Code provisions.

1. *Plans Required for Operations Larger than 200,000 Pounds*

The Iowa Code now requires that all owners of confinement feeding operations that are greater than 200,000 pounds to submit a manure management plan to the DNR.<sup>107</sup> This requirement exists for all confinement feeding operations constructed after May 31, 1985, and applies whether or not the operation is required to obtain a permit.<sup>108</sup> This is a significant change from pre-1998 manure management plan (MMP) requirements. Iowa law requires that an MMP be submitted to the DNR at the same time a permit application is submitted.<sup>109</sup> Manure may not be removed from a manure storage structure until the DNR approves the confinement operation's MMP.<sup>110</sup> An MMP must include the following:

- (1) calculations determining the land area required for manure application;<sup>111</sup>

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107. See Act of May 21, 1998, ch. 1209, § 30, 1998 Iowa Acts 658, 673 (to be codified at IOWA CODE § 455B.203(1)). Prior to 1998, only confinement feeding operations greater than 200,000 pounds which required a permit under Iowa law were required to submit a manure management plan. See IOWA CODE § 455B.203(1) (1997); see also IOWA ADMIN. CODE r. 567-65.16 (1997).

108. See *id.* § 30, 1998 Iowa Acts at 673 (to be codified at IOWA CODE § 455B.203(1)(a)).

109. See IOWA ADMIN. CODE r. 567-65.16.

110. See *id.* § 30, 1998 Iowa Acts at 673 (to be codified at IOWA CODE § 455B.203(1)). This is a significant requirement since this new law applies retroactively to all operations constructed after May 31, 1985. See *id.*, 1998 Iowa Acts at 673. After January 1, 1999, owners will not be able to spread manure until the approval is received or until an exception is granted by the DNR. See generally *id.* § 53, 1998 Iowa Acts at 681 (making the application restrictions applicable on January 1, 1999).

111. See IOWA CODE § 455B.203(2)(a) (1997). Iowa law specifically requires that the calculation be "based on nitrogen use levels in order to obtain optimum crop yields according to a crop schedule specified in the plan, and according to requirements adopted by the department after receiving recommendations from the animal agriculture consulting organization provided for in 1995 Iowa Acts, chapter 195, section 37." *Id.* A detailed explanation of how the land area required for manure application is calculated. See IOWA ADMIN. CODE r. 567-65.16(4) (1997). The calculation for the total nitrogen available from the confinement feeding operation is detailed in Iowa Administrative Code regulation 567-65.16(5). The calculation from crop usage rates may be found in Iowa Administrative Code regulation 567-65.16(6).

- (2) manure nutrient levels;<sup>112</sup>
- (3) “[m]anure application methods, timing of manure application, and the location of the manure application”;<sup>113</sup>
- (4) if the manure is to be applied on land not owned by the permit applicant, the application must include a copy of the written agreement with the landowner;<sup>114</sup>
- (5) estimates of annual manure volume and animal production;<sup>115</sup>
- (6) methods of preventing or diminishing soil loss and the potential for surface water pollution;<sup>116</sup>
- (7) methods of preventing odors, if spray irrigation equipment is used.<sup>117</sup>

Confinement feeding operations required to obtain a construction permit must not apply manure in an amount greater than that which will cause the nitrogen level calculations to exceed the levels required for optimum crop yields.<sup>118</sup> The nitrogen levels shall take into consideration all sources of nitrogen, including

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112. See IOWA CODE § 455B.203(2)(b) (1997). The Code states that the manure nutrient levels may be “determined by either manure testing or accepted standard manure nutrient values.” *Id.*

113. *Id.* § 455B.203(2)(c). For descriptions of the methods of manure application and timing, see IOWA ADMIN. CODE r. 567-65.16(7) (1997). For descriptions of what is required to satisfy the “location” requirement, see IOWA ADMIN. CODE r. 567-65.16(8) (1997).

114. See IOWA CODE § 455B.203(2)(d) (1997); see also IOWA ADMIN. CODE r. 567-65.16 (1997).

115. See IOWA CODE § 455B.203(2)(e) (1997). For a more detailed description of the animal production and manure volume, see IOWA ADMIN. CODE r. 567-65.16(9).

116. See IOWA CODE § 455B.203(2)(f) (1997); see also IOWA ADMIN. CODE r. 567-65.16(10).

The manure management plan shall include an identification of the methods, structures or practices that will be used to prevent or diminish soil loss and potential surface water pollution during the application of manure. The manure management plan shall include a summary or copy of the conservation plan for the cropland where manure from the animal feeding operation will be applied if the manure will be applied on highly erodible cropland. The conservation plan shall be the conservation plan approved by the local soil and water conservation district or its equivalent. The summary of the conservation plan shall identify the methods, structures or practices that are contained in the conservation plan. The manure management plan may include additional information such as whether the manure will be injected or incorporated or the type of manure storage structure.

*Id.*

117. See IOWA CODE § 455B.203(2)(g) (1997).

118. See IOWA ADMIN. CODE r. 567-65.16(1) (1997).

manure, commercial fertilizers, and legumes.<sup>119</sup> The levels may be established by actual soil testing samples, by the tables found in Chapter 65 of the Iowa Administrative Code, or from "other credible sources."<sup>120</sup>

An operator of a confinement feeding operation will be assessed a penalty if that operator fails to submit an MMP.<sup>121</sup> Further, operators are subject to penalties if they submit an MMP, but fail to comply with the terms of the plan.<sup>122</sup> MMPs are only required to be submitted to the DNR once, at the time of the permitting process.<sup>123</sup> However, if an operator is classified as a habitual violator, that operator must submit a manure management plan to the DNR each year, that must be approved by the DNR.<sup>124</sup> All confinement operations required by law to submit an MMP must "maintain records sufficient to demonstrate compliance with the manure management plan" at all times.<sup>125</sup>

The DNR has limited inspection rights under the Iowa law. The operation's records are only subject to disclosure if: (1) the records are needed in an action or administrative proceeding;<sup>126</sup> (2) a subpoena or court order requires disclosure;<sup>127</sup> or (3) the permit holder waives its confidentiality protection.<sup>128</sup> If the

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119. *See id.*

120. *Id.*

Other credible sources include, but are not limited to Iowa State University, the United States Department of Agriculture, a registered professional engineer, or an individual certified as a crop consultant under the American Registry of Certified Professionals in Agronomy, Crops, and Soils (ARCPACS) program, the Certified Crop Consultants (CCA) program, or the Registry of Environmental and Agricultural Professionals (REAP) program.

*Id.*

121. *See* IOWA CODE § 455B.191(7)(e) (1997). An operator of a confinement feeding operation is subject to a penalty of up to \$5000 per day for each day a violation continues. *See id.* § 455B.191(1). A violation may occur by "failing to submit a manure management plan as required pursuant to section 455B.203, or operating a confinement feeding operation without having a manure management plan approved by the department." *Id.* § 455B.191(7)(e).

122. *See id.* § 455B.203(6). This provision states: "[a] person submitting a manure management plan who is found in violation of the terms and conditions of the plan shall not be subject to an enforcement action other than assessment of a civil penalty pursuant to section 455B.191." *Id.*

123. *See id.* § 455B.203(1).

124. *See id.* § 455B.203(3).

125. Act of May 21, 1998, ch. 1209, § 31, 1998 Iowa Acts 658, 674 (to be codified at IOWA CODE § 455B.203(4)); *see also* IOWA CODE § 455B.203(4) (1997).

126. *See* IOWA CODE § 455B.203(4)(b) (1997). Any hearings regarding these records are closed. *See id.*

127. *See id.* § 455B.203(4)(c).

128. *See id.* § 455B.203(4)(a).

DNR has satisfied one of the three requirements above, it may inspect the confinement feeding operation's records.<sup>129</sup>

Although the MMP requirements may be a paperwork burden for livestock producers, the benefits that will come from them are as follows: (1) the livestock producer will have an opportunity to find out the actual amount of nutrients being applied to soils; (2) the livestock producer may spend less money on commercial fertilizers; (3) the potential for runoff from over-application will be minimized; (4) the parties will work out written agreements regarding manure application firmly establishing each parties' rights and obligations; and (5) the DNR will have more accurate records as to the amount of manure that is being applied to Iowa farmland. One potential issue regarding the submission of all of these plans is whether the DNR has sufficient staff and resources to regulate animal feeding operations;<sup>130</sup> however, this issue will have to be resolved in appropriations.

## 2. *Smaller Operations—Plans Required Starting in 1999*

Prior to the 1998 legislation, smaller confinement operations, between 200,000 and 625,000 pounds, may not have had to complete an MMP. Under the old administrative regulations, owners of confinement feeding operations that (1) stored its non-dry manure in a formed manure storage structure, (2) began after September 1995, and (3) had an animal weight capacity of less than the permit requirement but more than 200,000 pounds of animal weight capacity had to provide a manure management plan to the department.<sup>131</sup>

As mentioned in Part II.F, now all confinement operations of 200,000 pounds or more must submit MMPs that must be approved by the DNR.<sup>132</sup> The requirements for MMPs for smaller operations mirror that of the larger operations, even to the extent that a copy of land application agreements must be included.<sup>133</sup>

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129. See *id.* § 455B.203(4). Iowa law also states that the DNR "shall regularly inspect a confinement feeding operation if the operation or a person holding a controlling interest in the operation is classified as a habitual violator." *Id.* § 455B.203(5). The habitual violator must pay the costs of the inspections. See *id.*

130. See Act of May 27, 1997, ch. 213, § 5(5)(a)(2), 1997 Iowa Acts 734, 737. The Environmental Protection Division of the DNR received the following allocation: "at least \$424,600 and 9.00 FTEs shall be used to support the regulation of animal feeding operations." *Id.*, 1997 Iowa Acts at 737.

131. See IOWA ADMIN. CODE r. 567-65.18(1) (1997). The manure management plan must be provided to the department sixty days prior to the first land application of manure from the formed structure. See *id.* This requirement for a plan exempts manure stored in an exclusively dry form. See *id.*

132. See Act of May 21, 1998, ch. 1209, § 30, 1998 Iowa Acts 658, 673 (to be codified at IOWA CODE § 455B.203(1)).

133. See *id.*, 1998 Iowa Acts at 673. Prior to 1999, confinement operations under 200,000 pounds did not have to provide copies of manure application agreements. See IOWA ADMIN. CODE r. 567-65.18(2).

The plan also must include general information about the operation because the permitting process is not taking place and the enforcing authority needs the information.<sup>134</sup> The smaller operation owner is required to keep the manure management plan current and must maintain records that can prove compliance with the plan.<sup>135</sup> Otherwise, the same general rules apply for all operations.<sup>136</sup>

MMPs have been and will continue to become an important part of a livestock producer's business. Most producers now must comply with the content requirements for creating a plan and also must keep the plan current from year to year. These plans will soon become routine for most producers following them and for many attorneys who will draft them.

### III. POTENTIAL LIABILITIES FROM MANURE APPLICATION

Operators who raise livestock, and spread manure upon the ground are potentially liable for nuisance actions. Iowa law defines a nuisance as "[w]hatever is injurious to health, indecent, or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to unreasonably interfere with the comfortable enjoyment of life or property . . . ."<sup>137</sup> However, the Iowa farmer has several protections from nuisance actions under Iowa law.<sup>138</sup>

#### A. *Potential Liabilities for Manure Application as Shown By Iowa Case Law*

Several legal liabilities could result from the ownership of manure, the application of manure and the land on which the manure is applied. In *Weber v. IMT Insurance Company*,<sup>139</sup> Weber, the operator of a hog operation, was sued by a neighbor whose sweet corn crop was allegedly damaged by the smell of the manure which was hauled on the road adjacent to the sweet corn field.<sup>140</sup> The manure from Weber's spreaders had dropped manure onto the road, and the tires of the manure

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134. See IOWA ADMIN. CODE r. 567-65.18(2) (1997). The plan must include the owner's name, address, telephone number, the location of the operation, the animal weight capacity, the land area required for application, the total nitrogen available, the optimum crop yield, the crop usage rate, the manure application methods, the timing of application, the location of manure application, and the application rate. See *id.*

135. See *id.* r. 567-65.18(4).

136. See *id.* r. 567-65.18(3).

137. IOWA CODE § 657.1 (1997). Under Iowa law, animal feeding operations and the spreading of manure are *not* deemed to be nuisances per se or nuisance in fact. See *id.* § 657.2 (stating objects or conditions that are deemed nuisances under Iowa law).

138. See *id.* § 657.11.

139. *Weber v. IMT Ins. Co.*, 462 N.W.2d 283 (Iowa 1990).

140. See *id.* at 284.

spreader had tracked manure onto the road.<sup>141</sup> The neighbors sued for nuisance, alleging that odor from the manure left on the road "contaminated his sweet corn crop and made the corn unmarketable."<sup>142</sup> Although this case was actually a battle as to whether Weber or his insurance company was required to defend the lawsuit,<sup>143</sup> this case is a good example of the liabilities that can arise from the application of manure.<sup>144</sup>

In *Michael v. Michael*,<sup>145</sup> the issue was whether manure applied to land one-fourth of a mile from defendants' residence constituted a nuisance.<sup>146</sup> The defendants applied manure slurry from its hog operation on farm fields owned by the defendant, and the plaintiffs claimed that the manure slurry caused offensive odors, which lasted up to a week.<sup>147</sup> However, the defendants applied the manure over a number of days and thus, the smell allegedly lasted up to twenty days.<sup>148</sup> The court found that at times a nuisance did exist and thus enjoined the defendants from spreading the manure slurry from April 1 to December 1 of each year unless the manure was incorporated into the soil "on the same date the material [was] spread."<sup>149</sup>

In *Valasek v. Baer*,<sup>150</sup> a livestock operator spreading manure was sued for nuisance by his neighbors.<sup>151</sup> Defendant maintained a hog operation with three buildings, two of which had slurry pits under them.<sup>152</sup> Defendant would empty the pits "several times per year" and apply the manure to his farmland as fertilizer.<sup>153</sup> The court held the manure application a nuisance and enjoined the defendant from spreading manure near the plaintiff's residence.<sup>154</sup>

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141. *See id.*

142. *Id.*

143. *See id.* at 285.

144. *See id.* at 283. The *Weber* court ultimately held that the Webers did not intend or expect property damage to occur from the transport of their manure, and therefore, the Webers' umbrella policy provided coverage. *See id.* at 289. IMT thus had a duty to defend the Webers under the umbrella policy. *See id.*

145. *Michael v. Michael*, 461 N.W.2d 334 (Iowa 1990).

146. *See id.* at 334-35.

147. *See id.* at 335.

148. *See id.*

149. *Id.* The April 1 to December 1 ban was applied because the prevailing winds are from the south (towards their residence) during these months. *See id.* This case is quite controversial, as the DNR regulations suggest that manure not be spread on frozen or snow-covered ground. *See* IOWA ADMIN. CODE r. 567-65.2(11)(c) (1997) (stating "[m]anure application on frozen or snow-covered cropland should be avoided where possible."). In Iowa, the land tends to be frozen from December 1 to March 31.

150. *Valasek v. Baer*, 401 N.W.2d 33 (Iowa 1987).

151. *See id.* at 33.

152. *See id.* at 34.

153. *Id.*

154. *See id.* at 36. The court did not find the defendant's arguments convincing: that the nature of the neighborhood was rural and agricultural; that the defendant plowed

Nuisance cases such as these have occurred all over the agricultural community. In response to these types of nuisance cases, during the 1990s the Iowa legislature has passed several laws protecting livestock operations.

#### B. Nuisance Protection for Manure Application

Prior to the case of *Bormann v. Board of Supervisors*,<sup>155</sup> it was clear that Iowa's agricultural producers had limited statutory nuisance protections as found in Chapters 352 and 657 of the Iowa Code.<sup>156</sup> Prior to *Bormann*, all fifty states had at least one type of right-to-farm law providing some form of nuisance protection for farming activities.<sup>157</sup> In general, the right-to-farm laws do not provide an absolute defense.<sup>158</sup> For example, some states require that the farming operation be first in time in order for the protection to apply.<sup>159</sup> The *Bormann* decision was the first case to declare a right-to-farm law unconstitutional.<sup>160</sup>

In *Bormann*, several landowners applied to the Kossuth County Board of Supervisors to be designated as an agricultural area.<sup>161</sup> The Board eventually granted the application for the 960-acre agricultural area.<sup>162</sup> The Bormanns challenged the Board's decision, arguing that Iowa Code section 352.11 was unconstitutional.<sup>163</sup>

The issue of the case was "whether a statutory immunity from nuisance suits results in a taking of private property for public use without just compensation in violation of federal and Iowa constitutional provisions."<sup>164</sup> The Bormanns did not allege that any nuisance was created by the agricultural area; rather, the case

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or chiseled the manure under, in accordance with acceptable farming practices, in order to keep the odor down; and that the defendant would have to drive one-fourth of a mile farther to spread the manure on other ground. *See id.* at 35. Also, "the fact that defendant's hog operation was a lawful business and was being carried on in accordance with accepted standards does not impact on the finding of a nuisance." *Id.* It is important to note that this case was decided before Iowa Code § 657.11 was enacted. Section 657.11 states that if a person has received all permits required and practices generally accepted management practices, an animal feeding operation is not a public or private nuisance. *See* IOWA CODE § 657.11 (1997).

155. *Bormann v. Board of Supervisors*, 584 N.W.2d 309 (Iowa 1998).

156. *See infra* Part III.B.1-2.

157. *See* NEIL D. HAMILTON, DRAKE UNIV. AGRIC. LAW CTR., A LIVESTOCK PRODUCER'S LEGAL GUIDE TO: NUISANCE, LAND USE CONTROL, AND ENVIRONMENTAL LAW 24 (1992).

158. *See id.* at 22.

159. *See id.* at 21-61.

160. *See id.* at 43 (stating that as of 1992, no right-to-farm law had been found an unconstitutional taking of property).

161. *See Bormann v. Board of Supervisors*, 584 N.W.2d 309, 311 (Iowa 1998).

162. *See id.* at 312.

163. *See id.* at 311-12.

164. *Id.* at 311.

only challenged the constitutionality of the statute.<sup>165</sup> Therefore, the court did not find any damages in this case because the neighbors did not seek compensation.<sup>166</sup> The court instead found section 352.11(a)(1) invalid and unconstitutional.<sup>167</sup>

The court found that this case involved a private, not a public nuisance.<sup>168</sup> A private nuisance involves a civil wrong based on a disturbance by one citizen toward another citizen.<sup>169</sup> In contrast, a public nuisance is an interference with the rights of a community at large.<sup>170</sup> The court found that there was a constitutionally protected private property interest at stake.<sup>171</sup> The "property interest at stake here is that of an easement, which is an interest in land."<sup>172</sup> The court found that the right to maintain a nuisance lawsuit is an easement.<sup>173</sup>

[T]he nuisance immunity provision in section 352.11(1)(a) creates an easement in the property affected by the nuisance (the servient tenement) in favor of the applicants' land (the dominant tenement). This is because the immunity allows the applicants to do acts on their own land which, were it not for the easement, would constitute a nuisance. For example, in their farming operations the applicants would be allowed to generate 'offensive smells' on their property which without the easement would permit affected property owners to sue the applicants for nuisances.<sup>174</sup>

The court found that an easement is a property interest which is subject to the just compensation requirements of the Fifth Amendment of the United States and Iowa Constitution.<sup>175</sup>

The court found that the easement granted by the Board of Supervisors resulted in a taking of property without just compensation.<sup>176</sup> In order to reach this conclusion, the court cited *Lucas v. South Carolina Coastal Commission*.<sup>177</sup> Under *Lucas*, there are two categories of state action that must be compensated without further inquiry into further factors which may support the state's action: (1) permanent physical invasion of another's property, and (2) denial of all

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165. See *id.* at 313.

166. See *id.* at 321.

167. See *id.* at 321-22.

168. See *id.* at 314.

169. See *id.*

170. See *id.*

171. See *id.* at 315.

172. *Id.*

173. See *id.* at 316.

174. *Id.* (citations omitted).

175. See *id.*

176. See *id.* at 321.

177. See *id.* at 316 (citing *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003 (1992)).

economically beneficial or productive use of property.<sup>178</sup> The Iowa Supreme court expanded the first prong of the *Lucas* test to find that a physical taking or touching is not necessary for a taking to occur.<sup>179</sup> Thus, the court found that there was a "permanent physical invasion of the property,"<sup>180</sup> and that "[t]o constitute a per se taking, the government need not physically invade the surface of the land."<sup>181</sup>

The court used strong language, and specifically stated that "this is not a close case" and that the statute was "plainly—we think flagrantly—unconstitutional."<sup>182</sup> The court made this decision with full knowledge that the "political and economic fallout from [its] holding will be substantial."<sup>183</sup>

Thus, in summary: (1) the Board's approval of the agricultural area triggered the nuisance "immunity" of section 352.11(1); (2) the nuisance "immunity" provision is a property right because it creates, in effect, an easement in the neighbors' properties for the benefit of the farmers; (3) the easement would entitle the farmers to do acts on their property, which, were it not for the easement, would constitute a nuisance; (4) the nuisance "immunity" is a taking of the neighbors' private property without payment of just compensation in violation of the federal and state constitutions; (5) in enacting section 352.11(1), the legislature exceeded its authority; (6) section 352.11(1) is unconstitutional without force or effect.

The effects of this case could be broad sweeping, in that it could affect farmers large and small, livestock or grain. All farmers who currently are a part of an agricultural area in the State of Iowa no longer have a nuisance defense previously afforded to them by section 352.11(1)(a).

#### 1. *Iowa Code Chapter 352.*

The *Bormann* decision declared the nuisance protection found in section 352.11 unconstitutional, as it effected a taking of neighbors' private property.<sup>184</sup> However, this section will describe the state of law prior to that decision because agricultural nuisance protections are still a part of many states' right-to-farm laws.

If the land on which manure was to be applied was within an agricultural area, certain protections existed for the livestock operator. Chapter 352 allowed for owners of farmland to petition its county board of supervisors to create an

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178. See *id.* (citing *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003 (1992)).

179. See *id.* at 321.

180. *Id.* at 316.

181. *Id.* at 317.

182. *Id.* at 322.

183. *Id.*

184. See *id.* at 321-22.

agricultural area.<sup>185</sup> After an agricultural area had been created, “[a] farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation.”<sup>186</sup> However, if the farm operation was in violation of state or federal law, or the operator was negligent, the protection did not apply.<sup>187</sup>

The spreading of manure was specifically protected within Chapter 352.<sup>188</sup> Farm operations were protected, and a farm operation was and is defined as “a condition or activity which occurs on a farm in connection with the production of farm products and includes but is not limited to the raising, harvesting, drying, or storage of crops; the care or feeding of livestock; the handling or transportation of crops or livestock; *the treatment or disposal of wastes resulting from livestock* . . . .”<sup>189</sup> Therefore, if an agricultural area existed on the land in which manure was applied, based on the language of the statute, a landowner could have sued an operator applying manure only if a violation of state or federal law had occurred, or if the operator was negligent.<sup>190</sup>

## 2. Iowa Code § 657.11

The *Bormann* decision could very well affect the nuisance protection found in section 657.11. However, this section will describe the protections found in section 657.11 as they exist in the Code at the present time.

The Iowa legislature enacted section 657.11 with the following purpose in mind:

[T]o protect animal agricultural producers who manage their operations according to state and federal requirements from the costs of defending nuisance suits, which negatively impact Iowa's competitive economic position and discourage persons from entering into animal agricultural production. This section is to promote the expansion of animal agriculture in this state by protecting persons engaged in the care and feeding of animals.<sup>191</sup>

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185. See IOWA CODE § 352.6 (1997).

186. *Id.* § 352.11(a).

187. See *id.* § 352.11(b).

188. See *id.* § 352.11(a).

189. *Id.* § 352.2(6) (emphasis added).

190. See Iowa Op. Att’y Gen. No. 94-5-9, at 3 (1994). The Iowa Attorney General concluded that where an agricultural area exists, “a private landowner could file a nuisance action only where negligence or violation of a federal statute or regulation or state statute or rule is alleged.” *Id.*

191. IOWA CODE § 657.11(1) (1997).

This law states that an animal feeding operation shall not be found to be a public or private nuisance, or to be interfering with "another person's comfortable use and enjoyment of the person's property" unless an injury is found to be proximately caused by (1) the failure to comply with state or federal law, (2) the animal feeding operation unreasonably and for substantial periods of time interferes with the person's comfortable use and enjoyment of the property, (3) and the animal feeding operation "failed to use existing prudent generally accepted management practices reasonable for the operation."<sup>192</sup> Although these new standards have yet to be interpreted, it appears as though they protect farming operations applying manure to the land as long as they comply with all laws and all reasonable farming customs.<sup>193</sup> This protection exists without regard to the established date of operation or expansion of an animal feeding operation.<sup>194</sup>

### 3. Nuisance Defense Conclusions

While the *Bormann* case only invalidated the nuisance defense found in Iowa's agricultural area law, this case could have far-reaching implications. The agricultural nuisance defenses found in Chapter 657 and Chapter 172D of the Iowa Code could now be in jeopardy as well. In future cases the Iowa Supreme Court could expand its ruling to invalidate all agricultural nuisance defenses, not just the defense found in the agricultural area statute.

Without the statutory nuisance defense, Iowa's law reverts to the common law.<sup>195</sup> In common law nuisance cases, a court would consider all of the factors of each case, such as: priority in time; social utility of the conduct; locality and flavor of the neighborhood; the nature of the injury (mere annoyance versus a damage to

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192. Act of May 21, 1998, ch. 1209, § 38, 1998 Iowa Acts 658, 678 (to be codified at IOWA CODE § 657.11(2)(b)(2)). The protections in section 657.11 also apply to those operators who are not required by law to obtain a permit. *See id.*, 1998 Iowa Acts at 678 (to be codified at IOWA CODE § 657.11(5)). The protection is *not applicable* for chronic violators, as defined by Iowa Code 657.11(4). *See id.* § 39, 1998 Iowa Acts at 678 (to be codified at IOWA CODE § 657.11(4)).

193. *See id.* § 38, 1998 Iowa Acts at 678 (to be codified at IOWA CODE § 657.11(4)); *see also* IOWA CODE § 657.11(5) (1997). Section § 657.11(5) states:

The rebuttable presumption [created by this section] includes, but is not limited to, a defense for actions arising out of the care and feeding of animals; the handling or transportation of animals; the treatment or disposal of manure resulting from animals; the transportation and application of animal manure; and the creation of noise, odor, dust, or fumes arising from an animal feeding operation.

*Id.* § 657.11(5).

194. *See id.* § 38, 1998 Iowa Acts at 678 (to be codified at IOWA CODE § 657.11(5)).

195. *See* *Helmcamp v. Clark Ready Mix Co.*, 214 N.W.2d 126, 129 (Iowa 1974).

property); whether a person knew about the farming operation before coming to the area, among other factors.<sup>196</sup>

The Iowa Supreme Court ruling is the first of its kind in the nation; if other agricultural states follow Iowa's lead, this ruling could have consequences to all forms of agriculture on a national scale.

#### IV. MANURE APPLICATION AGREEMENTS

The use of a written manure application agreement may have been unusual ten years ago, but today it is an expected occurrence between operators and landowners. Manure application agreements are becoming much more prevalent for two reasons. First, written manure application agreements, as part of an MMP that must be submitted to the DNR, are required for operations larger than 200,000 pounds.<sup>197</sup> If an operator does not own enough land to spread all of the manure produced, the plan requires that a copy of a written agreement allowing for the application of manure on another person's land.<sup>198</sup> This is a significant and new requirement for operations greater than 200,000 pounds but less than 625,000 pounds. This new requirement, starting in 1999, will cause many producers to negotiate with their neighbors over written terms, instead of just an oral year-to-year agreement. Second, many operators and landowners alike fear legal problems linked to the spreading of manure, such as nuisance lawsuits, or DNR penalties for possible environmental violations linked to the manure application.

The Iowa State University Extension Service states that "[d]ue to the potential legal, agronomic, and economic consequences, all operators of livestock operations that require additional land for manure application and landowners accepting the manure should have a written agreement."<sup>199</sup> Therefore, this section will explain what manure application agreements are and what they do.

Manure application agreements are most often defined as "written contractual agreements used when a livestock operation requires land in addition to the land owned or rented by the livestock operation to apply manure."<sup>200</sup> Both parties benefit from a manure application agreement, in that the operator of the animal feeding operation is in need of a place to apply the manure, and the land owner will receive the benefit of the organic nutrients contained in manure, which will decrease or supplant the amount of commercial fertilizers needed for that

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196. See generally *id.* (defining the test for determining a nuisance).

197. See *id.* § 30, 1998 Iowa Acts at 673 (to be codified at IOWA CODE § 455B.203(1)).

198. See *id.* § 21, 1998 Iowa Acts at 668 (to be codified at IOWA CODE § 455B.165(6)(b)).

199. JOHN BAKER ET AL., IOWA STATE UNIV. EXTENSION, MANURE APPLICATION AGREEMENTS 1 (1996).

200. *Id.*

land.<sup>201</sup> Although “[m]anure application agreements are often referred to as leases, easements, or licenses,” the contents of the document will determine the status of the agreement rather than its actual title.<sup>202</sup> Manure application agreements are different from farm leases because the contract is for the right “to use the land for manure application only and the owner of the land retains the use of the land for all other purposes.”<sup>203</sup> A drafter should be wary of using the term “lease” for manure application agreements because farm leases are subject to specific statutory requirements under the Iowa Code.<sup>204</sup> The main difference between an easement and a license, in terms of a manure application agreement, is that an easement would continue after the parties sell or gift the property, while a license would be a personal agreement between the two parties, and thus would not continue after the parties sell or gift the property.<sup>205</sup> If the parties intend the agreement to continue, the written agreement should state so specifically.<sup>206</sup> A secondary difference between an easement and a license is that if the agreement is breached, the remedy for an easement is specific performance of the agreement, while the remedy for a license would likely be monetary damages.<sup>207</sup>

The parties to the manure application must include the owner of the animal feeding operation and the owner of the land where the manure is to be applied.<sup>208</sup> A tenant on the land where the manure is to be applied may not enter into an agreement for the application of manure, unless the tenant’s farm lease specifically allows for this authority.<sup>209</sup> However, if a landlord enters into a manure application agreement, the landlord must ensure that the terms are consistent with the farm lease and notify the tenant of the manure application arrangement.<sup>210</sup>

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201. See IOWA PORK PRODUCERS ASS’N, MANURE APPLICATION AGREEMENT 1 (1997).

202. *Id.* at 2.

203. *Id.*

204. See, e.g., IOWA CODE §§ 562.1-.11 (1997) (regulating notice and termination of farm leases). See also IOWA PORK PRODUCERS ASS’N, *supra* note 201, at 2.

205. See IOWA CODE §§ 562.1-.11 (1997).

206. See *id.*

207. See *id.*

208. See BAKER ET AL., *supra* note 199, at 1. Note also that for situations where tenants will perform all or part of the agreement, it is “advisable for the agreement to be between all of the parties.” IOWA PORK PRODUCERS ASS’N, *supra* note 201, at 2.

209. See IOWA PORK PRODUCERS ASS’N, *supra* note 201, at 2.

210. See *id.*

Furthermore, the lease between the landlord and crop tenant should address the terms of the manure application agreement which will be performed by the landlord or tenant. In addition, the lease should provide what payment, if any, is due to the landlord from the tenant for the nutrient value of the manure.

*Id.*

The terms of each individual contract should vary, based on specific needs of the parties. However, a list of provisions that should be included in every manure application agreement includes:

- (1) all parties to the agreement;
- (2) where the manure will come from;
- (3) where the manure will be applied;
- (4) who will supply the manure;
- (5) who will apply the manure;
- (6) length of the agreement;
- (7) ability to terminate and procedures for termination;
- (8) timing of the application;
- (9) method of manure application;
- (10) who will obtain all permits as required by law, and who is responsible for continued compliance with all laws;
- (11) levels of manure to be applied;
- (12) who will determine the level of soil nutrients;
- (13) whether (and amount) either party will be paid;
- (14) allocation of liability between the parties for lawsuits, penalties, etc.<sup>211</sup>

Manure application agreements are legally binding contracts and should not be entered into lightly. It is important for a livestock operator to consider the following factors before negotiating the terms of an agreement: (1) a guarantee that the manure is stored, removed, and applied in compliance with Iowa and federal laws; (2) a consideration of the cost of removing and applying the manure; (3) an evaluation of the value of the manure as fertilizer; (4) the potential nuisance liability from manure application.<sup>212</sup> In addition, a landowner should consider the following factors before negotiating the terms of an agreement: (1) the soil nutrient levels; (2) the nutrient supplied by the manure; (3) the crop nutrient requirements; (4) the cost of commercial fertilizers compared to using manure; and (5) the possibility of soil compaction or erosion after manure application.<sup>213</sup>

## V. CONCLUSION

The law regulating manure and its application is changing every year. In 1999, agricultural law attorneys will likely need to spend much time drafting manure management plans as well as manure application agreements.

Some producers might greet the 1998 changes with great reserve because no one likes to increase the number of rules one has to live by. However, most of

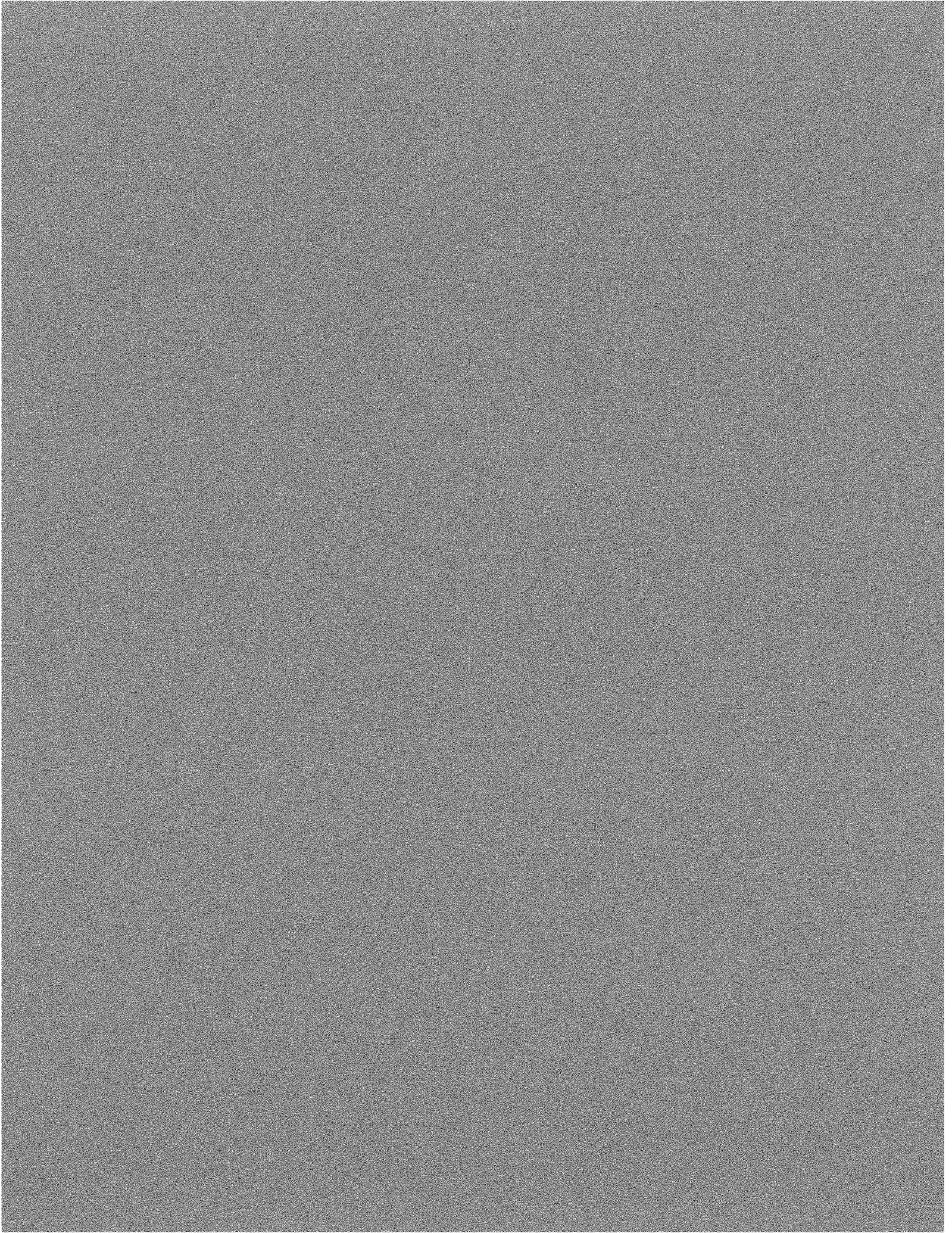
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211. See *id.* at 2-8; BAKER ET AL., *supra* note 199, at 1-5.

212. See IOWA PORK PRODUCERS ASS'N, *supra* note 201, at 1.

213. See *id.*

the changes that have resulted from the 1998 livestock bill are ones which producers can live with and which actually will benefit not only society, but all agriculture in the long run. As Iowa continues to keep a close eye upon animal feeding operations, the public will feel more and more at ease with larger livestock operations. The manure management plan requirements, while cumbersome, will give producers a chance to fully evaluate the benefits of the natural fertilizers they are applying to cropland. The manure applicator certification requirements have the potential to be a great educational tool. Separation distances are always controversial, but their effect is to assure neighbors that their home enjoyment rights are being protected. The 1998 livestock bill is a good compromise, one for which both producers and all Iowans should be pleased.



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Deer and Management: A Comprehensive Analysis of Iowa  
State Hunting Laws and Regulations

*Mindy Larsen Poldberg*

# DEER AND MANAGEMENT: A COMPREHENSIVE ANALYSIS OF IOWA STATE HUNTING LAWS AND REGULATIONS

*Mindy Larsen Poldberg*

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## I. INTRODUCTION

At dusk in Iowa, it is not uncommon to see a beautiful white tailed deer running through the countryside. As the deer leaps over fences with such grace and poise it truly takes one's breath away to see these magnificent animals up close, looking at a human intruder with a certain mixture of curiosity and reserve. In the white tailed deer, citizens of Iowa have a state treasure that cannot be seen in all areas of the country. However, the deer are not merely beautiful resources of the state of Iowa, but they also cause problems. They cause millions of dollars in crop damages, spread Lyme disease, destroy much of Iowa's natural habitat from

overuse, and cause serious automobile accidents that injure and kill members of the public when the deer run across the roads traveled by motor vehicles.

This Note will discuss the issue of the deer overpopulation problem in the state of Iowa. In particular, it will examine the measures that the Iowa Department of Natural Resources (DNR) is taking to control this problem, and evaluate the effectiveness of these measures. This Note will also discuss other relevant alternatives to the current regulations that could be used to control the growing deer population.

## II. THE HISTORY AND NATURE OF THE DEER POPULATION PROBLEM

Iowa's deer have increased in number due to a successful adaptation to their environment and a lack of natural predators. The deer have adapted particularly well to feeding in Iowa's cornfields, and in fact are surviving and reproducing in higher numbers than they would if they were in their natural habitat.<sup>1</sup> With abundant food during Iowa's corn harvest, the deer do not starve in the winter as occurs in many other Midwestern states.<sup>2</sup> Lastly, Iowa has no large predators feeding on the deer to naturally control the population.<sup>3</sup>

The United States Department of Agriculture (USDA) estimates that more than half of all United States farmers experience some economic loss from animal damage.<sup>4</sup> In dollar figures, the total annual loss to agriculture in the United States from wildlife is estimated to exceed \$500 million.<sup>5</sup> The USDA fully recognizes that animals are not only a resource, but a hazard. Wildlife, in general "is a significant public resource greatly valued by the American people. By its very nature, however, wildlife is a highly dynamic and mobile resource that can damage agricultural and industrial resources, pose risks to human health and safety, and affect other natural resources."<sup>6</sup>

A member of the Maryland Department of Natural Resources summarized the types of damage caused by deer as follows: "Deer cause vehicle accidents,

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1. See Allen Farris, Administrator, Iowa Department of Natural Resource, Speech at Drake University Law School, Natural Resources Law (Oct. 10, 1997) (on file with the *Drake Journal of Agricultural Law*). Farris stated that Iowa's deer show an increase in multiple births, and a decrease in fawn fatalities. A yearling doe will produce one healthy, surviving fawn; a two year old doe will produce twins; and a doe three years or older will produce at least twins, and likely to produce healthy triplets. See *id.*

2. See *id.*

3. See *id.*; see also Perry Beeman, *Collisions of Deer, Vehicles are Climbing*, DES MOINES REG., Dec. 1, 1997, at 4M (stating "[o]ther than vehicles, there are no other predators in Iowa").

4. See ANIMAL AND PLANT HEALTH INSPECTION SERVICE, U.S. DEP'T OF AGRIC., FACTSHEET — ANIMAL DAMAGE CONTROL 1 (1995).

5. See *id.*

6. ANIMAL AND PLANT HEALTH INSPECTION SERVICE, U.S. DEP'T OF AGRIC., ANIMAL DAMAGE CONTROL: MISSION AND STRATEGY 2 (1994).

browse in gardens and yards, eat agricultural crops like corn and fruit trees, carry ticks that transmit Lyme disease and, not infrequently, damage property by doing such things as jumping through plate glass windows."<sup>7</sup>

Iowa's deer population poses a large health and safety risk to Iowa's citizens as they drive cars on the roadway. In 1996, a record 12,276 deer were killed by vehicles on Iowa's roadways.<sup>8</sup> This is up from the average of 10,000 deer killed over the past ten years.<sup>9</sup> The most recent trends are even more staggering. Some areas of the state of Iowa have reported as much as a 66% increase in automobile-deer collisions over the past five years.<sup>10</sup> Moreover, experts indicate that the number of accidents is actually much higher than reported because drivers tend to report an automobile-deer accident only if a person is hurt.<sup>11</sup>

The Iowa Department of Transportation (DOT) issued a report tracing the number of unsalvageable<sup>12</sup> deer killed in the state of Iowa from 1987 to 1995.<sup>13</sup> The report states that during this nine year period, the number of unsalvageable deer struck by automobiles on Iowa's highways has increased from 2752 deer per year to 4740 deer per year.<sup>14</sup> This calculates to an increase of more than 72% over the nine year period. The sharp increase of deer killed by automobile accidents during approximately the past decade is strong evidence of the increasing overpopulation levels of deer. By 1995, a citizen of Iowa was 72% more likely to

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7. Pamela D. Andersen, *Managing Deer Management*, 11 SPG NAT. RESOURCES & ENV'T 54, 54 (1997). Deer often jump through plate glass windows in residential neighborhoods, causing much damage to the home. See *Dateline Iowa*, DES MOINES REG., Nov. 30, 1997, at 2B. An Iowa City Animal Control Officer stated that an offending "deer likely charged the window when it saw its reflection. Bucks often confront one another in the search for a mate." *Id.*

8. See Perry Beeman, *Collisions of Deer, Vehicles are Climbing*, DES MOINES REG., Dec. 1, 1997, at 4M. The automobile to deer accident totals are five times the annual kill twenty years ago. See *id.*

9. See Juli Probasco-Sowers, *Deer Population Above 'Tolerance' Level*, DES MOINES REG., Nov. 30, 1997, at 15A. Furthermore, twenty years ago the number of automobile to deer accidents averaged 3000 per year. See *id.*

10. See Frank Bowers, *Deer Are a Problem; Now What?*, DES MOINES REG., Mar. 28, 1997, at 1M.

11. See Perry Beeman, *Collisions of Deer, Vehicles are Climbing*, DES MOINES REG., Dec. 1, 1997, at 4M.

12. An unsalvageable deer is one that has been struck by an automobile or otherwise found on or near Iowa's road system which could not be salvaged for human consumption in any manner. This report is confined only to statistics on unsalvageable deer. Interview with Larry R. Heintz, Access and Utility Policy Administrator, Iowa Department of Transportation, Maintenance Division, Ames, Iowa.

13. See IOWA DEP'T OF TRANSP., STATEWIDE DEER KILL ANNUAL (UNSALVAGEABLE DEER), REPORT FOR YEARS 1987 TO 1995 (Nov. 1997). For a copy of this report, contact Larry R. Heintz, Access and Utility Policy Administrator, Iowa Department of Transportation, Maintenance Division, Ames, Iowa.

14. See *id.* at 1.

be hurt or injured in an automobile-deer collision than in 1985. Thus, the overpopulation of Iowa's deer has resulted in a serious life and health risk to its citizens.

An overabundance of deer in Iowa affects other natural resources and habitats for other animals in the state. For example, a professor of forestry at Iowa State University was quoted as stating that the deer population in Iowa may destroy wildflowers, tree seedlings, and songbird habitats.<sup>15</sup> Deer generally travel in herds, and trample on and overfeed in their habitat. As the number of deer increase in Iowa, it is likely that much of Iowa's natural vegetative habitats will be damaged or destroyed.

#### A. Statistics Available on Current Population Trends

A question that would seem most pertinent to any management regime is exactly how many deer exist in the State of Iowa. Yet, the Iowa Department of Natural Resources states that there is "no accurate count of the number of deer in Iowa."<sup>16</sup> Allen Farris, Administrator of the Iowa DNR, Fish and Game Division, has stated that it is impossible to have an actual count of the deer population, but that the DNR has population surveys taken to estimate the trends of the deer population.<sup>17</sup> Trends in the number of deer are established by three separate surveys. First, aerial surveys are conducted in January and February at a time when new snow accumulates to six or more inches.<sup>18</sup> Second, the number of deer that are killed by automobiles is recorded throughout the year by the Iowa Department of Transportation.<sup>19</sup> And third, spotlight surveys<sup>20</sup> are conducted by wildlife biologists and conservation officers during the month of April.<sup>21</sup> Based on the above deer tracking studies, Willy Suchy, an Iowa DNR wildlife biologist, estimates that the state's deer population is currently around 350,000.<sup>22</sup>

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15. See Larry Stone, *Flora and Fauna at Mercy of Humans*, DES MOINES REG., May 4, 1997, at 4D.

16. Jonathan Roos, *Legislation Piles Up Over Deer Population*, DES MOINES REG., Jan. 29, 1997, at 6M.

17. See Allen Farris, Administrator, Iowa Department of Natural Resource, Speech at Drake University Law School, Natural Resources Law (Oct. 10, 1997).

18. See IOWA DEP'T OF NATURAL RESOURCES, 1997 IOWA DEER HUNTING APPLICATION 19 (1997).

19. See *id.*

20. Spotlight surveys are explained by the DNR as "thirty-mile routes are driven after dark in good deer habitat and spotlights are used to count the number of deer seen in adjacent woodlands and fields." *Id.*

21. See *id.*

22. See Juli Probasco-Sowers, *Deer Population Above 'Tolerance' Level*, DES MOINES REG., Nov. 30, 1997, at 15A.

These surveys and other data have shown that Iowa's deer population has been steadily increasing over the past decade, and cities and counties all over Iowa are feeling the effects. For example, a count by the Polk County Deer Task Force revealed that "the Polk County herd nearly doubled in size between 1996 and 1997,"<sup>23</sup> and could double *again* by the year 2000 if nothing is done to control the deer population.<sup>24</sup> In Polk County, concentrations of deer range anywhere from 20 deer per square mile to 198 deer per square mile.<sup>25</sup> Also in Polk County, vehicle collisions with deer have increased by 66% in the past five years.<sup>26</sup> In order to address this problem, Polk County has established a Deer Task Force in order to monitor the deer and propose solutions.<sup>27</sup>

One group of Iowa citizens is seriously effected by the increasing number of deer—Iowa's agricultural producers.<sup>28</sup> A survey was conducted in November and December of 1996 by Iowa Agricultural Statistics for the Iowa Department of Natural Resources (DNR) to determine the attitudes of farm operators toward deer and other wildlife existing in Iowa.<sup>29</sup> The survey, which involved random calls to 1,245 Iowa farmers or agricultural product producers, determined that discontent existed over the increasing numbers of the deer population in the state.<sup>30</sup> Of all farmers surveyed, 95% stated that they had deer on the land they farmed,<sup>31</sup> and about 70% reported damage to their crops caused by deer.<sup>32</sup> Row crop farmers

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23. Perry Beeman, *Permit Would Take Aim at Deer Count*, DES MOINES REG., Oct. 2, 1997, at 1M.

24. See Andrew Blechman, *Council: No Bow Hunting in W.D.M.*, DES MOINES REG., Sept. 10, 1997.

25. See Frank Bowers, *Deer Are a Problem; Now What?*, DES MOINES REG., Mar. 28, 1997, at 1M.

26. See *id.*

27. See *id.* Persons in Polk County who would like information on the Deer Task Force or who would like to make comments may call (515) 323-6250.

28. This paper will refer to "farmer" and "producer" interchangeably. A farmer or producer is intended to mean any person who cultivates crops such as corn, soybeans, alfalfa, wheat, milo, sorghum or any other grain, and high value crops such as Christmas trees, fruits, vegetables, nurseries or nuts. A farmer or producer also includes those who raise domesticated livestock, such as cattle, swine, sheep, horses, turkeys and chickens.

29. IOWA AGRICULTURAL STATISTICS, IOWA DEP'T OF NATURAL RESOURCES, ATTITUDES OF FARM OPERATORS TOWARDS DEER AND OTHER WILDLIFE 1996 (1997); Larry Stone, *Farmers Oppose Deer Kill-Off*, DES MOINES REG., Feb. 7, 1997, at 1; *Farmers and Deer*, DES MOINES REG., Feb. 7, 1997, at 2M.

30. See Larry Stone, *Farmers Oppose Deer Kill-Off*, DES MOINES REG., Feb. 7, 1997, at 1.

31. See IOWA AGRICULTURAL STATISTICS, IOWA DEP'T OF NATURAL RESOURCES, ATTITUDES OF FARM OPERATORS TOWARDS DEER AND OTHER WILDLIFE 1996, at 3 (1997).

32. See *id.* These numbers reported for Iowa correspond with the national figures promulgated by the USDA. The USDA reports that more than 50% of all farmers experience economic loss from some type of animal damage. See ANIMAL AND PLANT HEALTH INSPECTION SERVICE, U. S. DEP'T OF AGRIC., FACTSHEET — ANIMAL DAMAGE CONTROL 1 (1995).

were most concerned with the damage the deer caused to corn.<sup>33</sup> Approximately 65% of all producers surveyed felt that the numbers of deer in the state needed to decrease.<sup>34</sup> Twenty-one percent of all producers felt that the amount of damage was unreasonable.<sup>35</sup> About 33% of all producers who felt that the damage caused to their crops was unreasonable stated that they had contacted the Iowa DNR for assistance with their deer damage problems.<sup>36</sup>

#### B. Past Attempts to Control the Deer Population

In past years, the Iowa Department of Natural Resources has attempted to deal with the deer overpopulation issue by increasing the number of deer-hunting licenses given to in-season hunters. The DNR issued the following numbers of licenses in the past six years:<sup>37</sup>

<u>YEAR</u>	<u>LICENSES</u>
1991	181,146
1992	183,555
1993	165,493
1994	176,617
1995	179,752
1996	212,060

The number of licenses issued does not directly correlate with the number of deer actually killed. For example, in 1996 approximately 58% of hunters who hunted were able to recover a deer.<sup>38</sup>

Administrator Allen Farris has stated that the DNR's goal is to establish the optimum number of deer licenses that would result in a balance between what the habitat can support, and what the community, farmers, and motorists feel is

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33. See IOWA AGRICULTURAL STATISTICS, IOWA DEP'T OF NATURAL RESOURCES, ATTITUDES OF FARM OPERATORS TOWARDS DEER AND OTHER WILDLIFE 1996, at 3 (1997). The evidence indicates that row crop farmers have had more noticeable damage to corn fields than to soybean or other grain fields. See *id.* High value producers, however, still sustain more damages than other types of producers. See *id.*

34. See *id.*

35. See *id.*

36. See *id.*

37. Jonathan Roos, *Legislation Piles Up Over Deer Population*, DES MOINES REG., Jan. 29, 1997, at 6M.

38. See IOWA DEP'T OF NATURAL RESOURCES, 1997 IOWA DEER HUNTING APPLICATION 20 (1997). Furthermore, of the licenses issued in 1996, only 185,599 hunters actually hunted deer, and 107,615 deer were harvested overall. See *id.*

sufficient.<sup>39</sup> The Iowa DNR's goal is not an uncommon one, as explained by Pamela Andersen, assistant attorney general of the Maryland Department of Natural Resources. She states that:

[T]he difficult issue facing natural resource and wildlife managers is not choosing the most biologically sound method of reduction, but finding the most culturally acceptable and affordable method. Biologists calculate and watch two key indices to monitor deer population — biological carrying capacity and cultural carrying capacity. Biological carrying capacity measures how many deer an area can support with sufficient food and living space. Cultural carrying capacity measures the number of deer an area can support without causing too much negative interaction with humans.<sup>40</sup>

Thus, it may be that Iowa's habitat could support the current increase in the deer population, but that Iowa's citizens just will not tolerate any more deer.<sup>41</sup> In order to meet the citizen's demands, the DNR has increased the number of deer hunting licenses issued. Although increasing the number of licenses will eventually decrease the total population, many high concentration areas of deer will not decrease due to the state's inability to control *where* permitted hunters choose to use their licenses. Therefore, additional action is needed to address this problem.

### C. *Why the Need to Shoot the Deer?*

When overpopulation occurs, causing danger to citizens, action must be taken to control the deer population. Shooting the deer seems to be the best alternative because few other methods have been effective in controlling the population. Fences are not an adequate remedy, as deer can easily jump fences as high as eight feet.<sup>42</sup> Also, urban areas are not immune from deer population problems because deer have become accustomed to living among people and are not afraid of them.<sup>43</sup> Thus, they damage residential areas, such as ornamental

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39. See Allen Farris, Administrator, Iowa Department of Natural Resource, Speech at Drake University Law School, Natural Resources Law (Oct. 10, 1997); Larry Stone, *Group Advocates More Deer Hunting*, DES MOINES REG., Feb. 14, 1997, at 15; IOWA CODE § 481A.39 (1997).

40. Pamela D. Andersen, *Managing Deer Management*, 11 SPG NAT. RESOURCES & ENV'T 54, 54 (1997).

41. See Juli Probasco-Sowers, *Deer Population Above 'Tolerance' Level*, DES MOINES REG., Nov. 30, 1997 at 15A (quoting a DNR biologist claiming that "deer numbers are above the 'tolerance' level this year").

42. See Pamela D. Andersen, *Managing Deer Management*, 11 SPG NAT. RESOURCES & ENV'T 54, 54 (1997).

43. See *id.*

plants, fruit trees, lawns and gardens. Deer repellents also have been tried in several areas of the country, but the repellents have been found to be only nominally effective.<sup>44</sup>

1. *Compensation for Property Damage*

Other states have alternative methods of dealing with a deer overpopulation problem. In Wisconsin, for example, a fund has been established to pay for wildlife damage control.<sup>45</sup> The fund is supplied with monies derived from all special deer licenses and a one dollar surcharge placed on every hunting license.<sup>46</sup> This fund over a number of years has accrued more than \$3 million.<sup>47</sup> The fund is used to pay for "fences, technical assistance and claims to farmers who allow hunting and work with wildlife biologists."<sup>48</sup> Claims to the fund work somewhat like insurance. First, a property owner is not eligible for damage assistance until after \$250 of damage has occurred, much like an insurance deductible.<sup>49</sup> Further, the damages that Wisconsin will pay is limited, as a property owner may only receive assistance for damages up to \$5000.<sup>50</sup> The property owner, in order to collect assistance for damages, must "permit hunting of the animals causing the wildlife damage on the land where the wildlife damage occurred and on contiguous land under the same ownership and control."<sup>51</sup>

The wildlife bureau chief for the Iowa DNR stated that a plan such as the Wisconsin plan would not work in Iowa because Wisconsin has a larger human population than Iowa.<sup>52</sup> This means Wisconsin would have far more contributions to the fund than would Iowa. Also, Wisconsin has far fewer producers than Iowa does, resulting in a fewer number of potential Wisconsin persons who could make

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44. *See id.* Deer are able to adapt to sound and odor deterrents, and become less afraid of manmade deterrents after a short time. *See id.*

45. *See* WIS. STAT. § 29.598 (1997); Larry Stone, *Solutions Studied for Iowa's Deer*, DES MOINES REG., Feb. 7, 1997, at 2M.

46. *See* WIS. STAT. § 29.092(14)(a), (c) (1997) (stating that persons who apply for a license to hunt wildlife "shall pay a wildlife damage surcharge of \$1" and that fees "shall be deposited in the conservation fund to be used for the wildlife damage abatement program, [and] the wildlife damage claim program").

47. *See* Larry Stone, *Solutions Studied for Iowa's Deer*, DES MOINES REG., Feb. 7, 1997, at 2M.

48. *Id.*

49. *See* WIS. STAT. § 29.598(7)(b)(3) (1997) (stating that "[n]o person may receive any payment for the first \$250 of each claim for wildlife damage").

50. *See* WIS. STAT. § 29.598(7)(b)(2) (1997) (stating that "[n]o person may receive a payment in excess of the actual amount of the wildlife damage or \$5000, whichever is less").

51. WIS. STAT. § 29.598 (7m)(a) (1997).

52. *See* Larry Stone, *Solutions Studied for Iowa's Deer*, DES MOINES REG., Feb. 7, 1997, at 2M.

claims to the fund.<sup>53</sup> Therefore, it is likely that the Wisconsin plan would not be effective in Iowa due to potential under-funding and overuse.

## 2. Contraception

Although contraception for deer may seem like an obvious and humane method of controlling the deer population, this solution is not yet a viable one for Iowa's deer population. Experimental techniques have been developed to control animal reproduction, but none have been approved for use on free ranging animals.<sup>54</sup> A technique called "immunocontraception" involves "immunizing deer with a drug that prevents conception."<sup>55</sup> This process has been found to be ineffective, however, in that the process works very slowly; it does not solve the problem of the current population, but merely reduces the number of young born.<sup>56</sup> "If the deer are already over the biological carrying capacity, immunocontraception will not prevent them from causing damage, starving, or becoming diseased for several years."<sup>57</sup>

Furthermore, immunocontraception is not an especially good idea because it has a negative impact on the gene pool of the deer population. It has been found that contraceptives are more effective on healthy deer, and that "widespread use of immunocontraception may result in the unintended consequence that healthier, inoculated deer will not produce young while the unhealthy deer may reproduce."<sup>58</sup> The reality of contraception alternatives is that they have not proven to be effective, may have a negative impact on the gene pool, are expensive, and are still considered to be experimental. Therefore, at this point in time contraception is not a viable option for the Iowa DNR.

Because contraceptives are experimental and detrimental to gene pools, many state Departments of Natural Resources, including Iowa's, have wisely resorted to the most effective and least costly alternative: increased hunting of the deer population, with special permits available to high concentration areas. Until a safe and effective means of wildlife contraception is developed, hunting will continue to be the best alternative.

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53. See *id.*

54. See Larry Stone, *Permits Urged for Polk Deer Hunting*, DES MOINES REG., May 28, 1997, at 3M.

55. Pamela D. Andersen, *Managing Deer Management*, 11 SPG NAT. RESOURCES & ENV'T 54, 54 (1997).

56. See *id.*

57. *Id.*

58. *Id.*

### III. CURRENT STATE LAW — CODE REQUIREMENTS

#### A. State Ownership of Wildlife

The State of Iowa has an important natural resource interest in its white tailed deer population. In fact, the legislature has established that the State has ownership and title to its resources. Iowa Code § 481A.2 states: "The title and ownership of all fish . . . and of all wild game, animals, and birds . . . and all other wildlife, found in the state, whether game or nongame, native or migratory . . . are hereby declared to be in the state . . . ."<sup>59</sup> The power of a state to exercise dominion and control over its wildlife has been established by this nation's highest court, in *Geer v. Connecticut*.<sup>60</sup> The Court quoted the following with approval:

We take it to be the correct doctrine in this country, that the ownership of wild animals, so far as they are capable of ownership, is in the state, not as a proprietor but in its sovereign capacity as the representative and for the benefit of all its people in common.<sup>61</sup>

The extent of the state's ownership interest is limited, in that the state is not liable for damages caused by a deer's actions in the same manner as other private owners of animals. For example, a private citizen who owns a bull that escapes is liable for the damage the bull causes to nearby crops.<sup>62</sup> As will be explained, however, the opposite result is reached with animals owned by the state.

The Supreme Court of Iowa has determined that the State is not liable for damages caused by its wildlife. In *Metier v. Cooper Transport Co.*, the court held that the State's ownership interest in the deer did not provide a basis for liability.<sup>63</sup> *Metier* involved a case in which a motorist swerved to avoid a deer that was on the highway and was subsequently struck by an oncoming truck.<sup>64</sup> The motorist sued the State, alleging that the State should be liable for the damage caused by the deer,

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59. IOWA CODE § 481A.2 (1997).

60. *Geer v. Connecticut*, 161 U.S. 519 (1895).

61. *Id.* at 529; *see also* *Missouri v. Holland*, 252 U.S. 416, 434 (1919) (stating "no doubt it is true that as between a state and its inhabitants, the state may regulate the killing and sale of such birds . . . ."). Migratory birds, however, are specifically excepted from the state's control. "Wild birds are not in the possession of anyone; and possession is the beginning of ownership. The whole foundation of the state's rights is the presence within their jurisdiction of birds that yesterday had not arrived, to-morrow may be in another state, and in a week a thousand miles away . . . ." *Id.* at 434; Migratory Bird Treaty Act of July 3, 1918, 16 U.S.C. § 703 (1994); *cf.* Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543 (1994) (attempting to provide a comprehensive system whereby the ecosystems upon which endangered species and threatened species depend may be conserved).

62. *See* IOWA CODE §§ 169C.1-169C.5 (1997).

63. *Metier v. Cooper Transp. Co.*, 378 N.W.2d 907, 914 (Iowa 1985).

64. *See id.* at 908.

just as a private owner would be liable, and therefore the State's control and supervision over the deer population under the Iowa Code was a basis for liability.<sup>65</sup> The Iowa Supreme Court disagreed with the plaintiff motorist, stating: "We are unconvinced that the State's interest in the wild animals of this jurisdiction can be equated with a farmer's interest in his livestock . . . . The State's interest more accurately is characterized as an ownership or title in trust, to conserve natural resources for the benefit of all Iowans."<sup>66</sup> The court reasoned that:

To hold the State liable for all the conduct of its wild animals in every situation would pose intractable problems, and intolerable risks to the ultimate ability of the State to administer its trust. The heritage of wildlife beauty and splendor the State seeks to preserve for future generations might well be lost.<sup>67</sup>

The court then concluded that the State of Iowa had no legal liability for the actions of or the damages caused by its deer.<sup>68</sup>

Yet, the trust or ownership interest that Iowa holds in its deer population does come with responsibilities, as required by state law. Under the Iowa Code, the DNR has a general duty to protect and preserve the wild animals of the state and enforce the laws relating to the animals.<sup>69</sup> The DNR must also "collect, classify, and preserve all statistics, data, and information as in its opinion tend to promote [the animals], conduct research in improved conservation methods, and disseminate information to residents and non-residents."<sup>70</sup> The director of the DNR also must submit a report to the Natural Resource Commission every five years, analyzing any options for controlling the deer population in Iowa, as well as prevention of economic damage to private property.<sup>71</sup> The director of the DNR is also required to establish a committee of farmers who will keep the director advised of the level of property damage caused by deer.<sup>72</sup>

The State of Iowa clearly has an important interest in protecting its deer population. Iowa holds title to its wildlife, in trust, for its citizens, and the DNR has been given the responsibility for monitoring, protecting and controlling the deer

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65. See *id.* at 914.

66. *Id.*

67. *Id.*

68. See *id.*

69. See IOWA CODE § 456A.23 (1997).

70. *Id.*

71. See IOWA CODE § 455A.4(j)(3)-(4) (1997).

72. See IOWA CODE § 481A.10A (stating that "[t]he director shall establish a farmer advisory committee for the purpose of providing information to the department regarding crop and tree damage caused by deer, wild turkey, and other predators").

population. However, Iowa's ownership interest is limited and cannot create a cause of action for damages caused by the wildlife.

*B. Rules and Regulations Regarding the Taking of Iowa Wildlife*

1. *Authority and Management Criteria*

If hunting is the answer to the deer overpopulation problem within the State of Iowa, the State must decide if, when, and how much hunting occurs. The Iowa Code clearly and unambiguously regulates the taking of any wildlife within the state. The law states:

It is unlawful for a person to take, pursue, kill, trap or ensnare, buy, sell, possess, transport, or attempt to so take, pursue, kill, trap or ensnare, buy, sell, possess, or transport any game, protected non-game animals, fur-bearing animals or fur or skin of such animals, mussels, frogs, spawn or fish or any part thereof, except upon the terms, conditions, limitations, and restrictions set forth herein, and administrative rules necessary . . . .<sup>73</sup>

Iowa Code § 481A.38 further provides that the commission may "alter, limit, or restrict the methods or means employed and the instruments or equipment used" to take any wild animal.<sup>74</sup>

In order to decide whether increased hunting is needed, the State must determine the extent and need for population reduction. The Code states the Natural Resource Commission is to determine whether or not a biological balance exists in the State of Iowa. It states:

The commission is designated the sole agency to determine the facts as to whether biological balance does or does not exist. The commission shall, by administrative rule, extend, shorten, open or close seasons and set, increase, or reduce catch limits, bag limits, size limits, possession limits, or territorial limitations or further regulate the taking conditions in accordance with sound fish and wildlife principles.<sup>75</sup>

The Code gives additional authority to the commission to establish open seasons and limits for hunting animals and game birds under Iowa Code § 481A.48.<sup>76</sup>

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73. IOWA CODE § 481A.38 (1997).

74. IOWA CODE § 481A.38(1) (1997).

75. IOWA CODE § 481A.39 (1997).

76. See IOWA CODE § 481A.48 (1997). This code provision mirrors sections 481A.38 and 481A.39 by stating:

No person, except as otherwise provided by law, shall willfully disturb, pursue, shoot, kill, take or attempt to take or have in possession any of the following

It is clear from the above statutes that the State is the only entity with the authority and ability to address the deer overpopulation issue. Therefore, this Note will examine Iowa's current rules and regulations regarding the hunting of deer.

## 2. *Licensing and Safety Rules Regulating Hunting*

Before any person may hunt in the State of Iowa, that person must obtain a license from the Department of Natural Resources.<sup>77</sup> In order to hunt deer, an Iowa resident must have a resident hunting license, a deer hunting license and a wildlife habitat stamp.<sup>78</sup> Annual fees are paid for each.<sup>79</sup> A nonresident who wishes to hunt deer in the State of Iowa must "have only a nonresident deer license and a wildlife habitat stamp."<sup>80</sup> Nonresident hunters must pay a higher fee than an Iowa resident.<sup>81</sup> The number of nonresident licenses issued by the Department of Natural Resources is limited by statute to 5000 licenses.<sup>82</sup>

The Iowa Code provides for certain safety measures that must be observed before a person is allowed to hunt deer in the state. For example, before a person is allowed to obtain a deer or other hunting license, that person must have completed a hunter safety and ethics education program, whether the applicant is a resident of Iowa or a nonresident.<sup>83</sup> In addition, Iowa Code § 481A.122 more

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game birds or animals except within the open season established by the commission . . . . The seasons, bag limits, possession limits and locality shall be established by the department or commission . . . .

*Id.*

77. See IOWA CODE § 483A.1 (1997). Specifically, this provision states:  
[N]o person shall fish, trap, hunt, pursue, catch, kill or take in any manner, or use or have possession of, or sell or transport all or any portion of any wild animal, bird, game or fish, the protection and regulation of which is desirable for the conservation of the resources of the state, without first procuring a license or certificate so to do and the payment of a fee . . . .

*Id.*

78. See IOWA CODE § 483A.8(1) (1997). Special rules apply for minors. See, IOWA CODE §§ 483A.24(7), 483A.27 (1997).

79. See IOWA CODE §§ 483A.1(2), 483A.1(6)(h) (1997). Fees are established as follows: resident hunting license — \$12.50; deer hunting license — \$25.00; and wildlife habitat stamp — \$5.00. See *id.* Note, however, that an owner or tenant of farm land may receive one free license each year, and that this free license is only valid on the farm unit owned or rented by that person. See IOWA CODE §§ 483A.24(1), (2)(b) (1997).

80. IOWA CODE § 483A.8(3) (1997).

81. See IOWA CODE §§ 483A.1(2), 483A.1(6)(h) (1997). Fees for the nonresident licenses are: nonresident deer license — \$110.00; and a wildlife habitat stamp — \$5.00.

82. See IOWA CODE § 483A.8(3) (1997).

83. See IOWA CODE § 483A.27 (1997); IOWA CODE § 483A.8(3) (1997). Persons born before January 1, 1967 are exempt from the hunter safety and ethics requirements. See IOWA CODE § 483A.27(1) (1997).

specifically provides that "a person shall not hunt deer with firearms unless the person is at the time wearing one or more of the following articles of visible, external apparel . . . the color of which shall be solid blaze orange."<sup>84</sup>

### 3. *Penalties Provided for Not Following the Hunting Laws*

Because Iowa has many laws and regulations regarding deer hunting, it is important for any hunter, including producers, to know the law before shooting any deer in the State. The Iowa Code has specific provisions outlining the punishments for taking a wild animal without a proper license. The following section will examine those laws that apply to hunting in general, with specific attention paid to deer hunting. First of all, Iowa Code § 481A.32 states that:

Whoever shall take, catch, kill, injure, destroy, have in possession, buy, sell, ship, or transport any . . . game, or animals . . . in violation of the provisions of this chapter or the administrative rules of the commission or whoever shall use any device . . . the use of which is prohibited by this chapter, or use the same at a time, place, or in a manner or for a purpose prohibited, or do any other act in violation of the provisions of this chapter or of administrative rules of the commission for which no other punishment is provided, is guilty of a simple misdemeanor and shall be assessed a minimum fine of ten dollars for each offense. Each . . . animal unlawfully caught, taken, killed, injured, destroyed, possessed, bought, sold, or shipped shall be a separate offense.<sup>85</sup>

Furthermore, the same code provision provides that a person who shoots a deer with a prohibited weapon is "subject to a fine of one hundred dollars for each offense committed while taking the animal with the prohibited weapon."<sup>86</sup> Section 481A.32 is not the only law providing penalties for the taking of wildlife. Section 481A.130 states that "a person convicted of unlawfully selling, taking, catching, killing, injuring, destroying, or having in possession any animal, shall reimburse the state . . . for each deer, one thousand five hundred dollars."<sup>87</sup> In addition, fines of one hundred dollars are given for killing a deer in violation of Iowa Code § 481A.38, relating to the taking of any game.<sup>88</sup>

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84. IOWA CODE § 481A.122 (1997).

85. IOWA CODE § 481A.32 (1997).

86. *Id.* The Iowa Code regulates the use of guns while hunting as follows: "No person shall use a swivel gun, nor any other firearm, except such as is commonly shot from the shoulder or hand in the hunting, killing or pursuit of game, and no such gun shall be larger than number 10 gauge." IOWA CODE § 483A.37 (1997).

87. IOWA CODE § 481A.130 (1997).

88. See IOWA CODE § 805.8(5)(f)(1) (1997).

In conclusion, taking a deer without a proper license to do so is not a minimal offense. A hunter is subject to a *minimum* fine of \$1610 for each deer taken, and an additional \$100 for each time a shot was fired from a weapon not allowed by law.<sup>89</sup> Therefore any hunter in the State of Iowa, including a producer attempting to take a deer that is damaging the producer's private property, should follow all of the available options for acquiring a valid permit before shooting a white tailed deer.

#### IV. PROTECTION OF PRIVATE PROPERTY RIGHTS

As noted in Section II *supra*, the deer within Iowa are damaging private property, especially agricultural crops in the state. Many Iowa producers and landowners feel that they should simply be able to kill an offending animal. As Iowa Code § 481A.38 makes clear, no person may kill a deer except as provided by law.<sup>90</sup> A limited exception for private property owners may exist, however, based on a constitutional right to protect property.

In *State v. Ward*, a private property owner was charged with killing a deer in violation of a statute making it unlawful and criminal for any person other than the owner to kill any deer.<sup>91</sup> He was tried and found guilty at the trial court level, but the verdict was reversed by the Supreme Court of Iowa based on the defendant's plea of reasonable self defense.<sup>92</sup> The court held that a person has a constitutional right in the State of Iowa to defend person *and* property.<sup>93</sup> Further, "if in this case it was reasonably necessary for the defendant to kill the deer in question in order to prevent substantial injury to his property, such fact, we have no doubt, would afford justification for the killing."<sup>94</sup> In so holding the court emphasized the fact that the deer was actually "engaged in the destruction of the defendant's property" and that its ruling did not apply to killings which were preventative or in retaliation for past damage.<sup>95</sup>

The right to kill a deer or other wildlife in defense of person or property has been established in a number of states, in addition to Iowa.<sup>96</sup> In jurisdictions where a state constitutional provision provides for the right to acquire, possess and protect property, it is well established that the right exists to kill a wild animal to

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89. See IOWA CODE §§ 481A.32, 481A.38, 481A.130 (1997).

90. See IOWA CODE § 481A.38 (1997).

91. See *State v. Ward*, 152 N.W. 501, 501 (Iowa 1915).

92. See *id.* at 501.

93. See *id.* at 502 (relying on IOWA CONST. art. I, § 1).

94. *Id.*

95. *Id.*

96. See J. C. Vance, Annotation, *Right to Kill Game in Defense of Person or Property*, 93 A.L.R.2d 1366, 1368 (1964).

protect that property.<sup>97</sup> Furthermore, if such a state attempted to pass a statute stating that a person did not have this right to protect property, the state statute would be held unconstitutional.<sup>98</sup> This does not mean that a landowner can shoot an offending animal at will. Some possible limitations on this right to protect one's property exist. For example, one state statute, which required a property owner to obtain a permit before exercising his constitutional right to protect his property, was found to be a valid restraint on a person's constitutional right.<sup>99</sup>

Even if no statute exists limiting a person's right to protect one's property, this right is not without limits. As mentioned in *State v. Ward*, the use of force must be reasonably necessary for the protection of one's property.<sup>100</sup> This requirement of reasonableness has been held necessary in several other states, as well as in Iowa.<sup>101</sup> Some states require that all other legal remedies must be exhausted before a person may kill a wild animal.<sup>102</sup> However, no case specifically stating a requirement to exhaust remedies exists in the State of Iowa.

In conclusion, a right to protect one's private property certainly exists in the State of Iowa, as guaranteed by the Iowa Constitution. However, this constitutional right is not absolute. The particular offending animal must be "caught in the act" of destroying one's property, and the act of killing the offending animal must be reasonable in light of the amount of damage that it is causing. Because many states have held that a person must exhaust all legal

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97. See, e.g., *State v. Rathbone*, 100 P.2d 86 (Mont. 1940) (holding that the defense of legal justification was proper and constitutionally guaranteed when used to prevent a wild elk from destroying private property); *Aldrich v. Wright*, 53 N.H. 398 (1873) (holding that a constitutionally guaranteed right to defend and protect property applied to the killing of a mink out of season); *Commonwealth v. Bloom*, 21 Pa. D. & C.2d 139 (1959) (reversing a conviction for killing a deer that was destroying a lawn and plantings on personal property due to the state's constitutional right to acquire, possess, and protect property).

98. See *State v. Brinkman*, 33 Ohio Law Abs. 362 (1941) (stating that the statute protecting wild game was in conflict with the fundamental right of every landowner to defend his property, and that if this right were to be abrogated by the state statute, that statute would be unconstitutional and void).

99. See *State v. Webber*, 736 P.2d 220 (Or. Ct. App. 1987) (convicting a rancher of killing a deer when he did so to protect his hay feeders, and finding that the rancher should have obtained a permit to kill the deer).

100. See *State v. Ward*, 152 N.W. 501, 502 (Iowa 1915); J. C. Vance, Annotation, *Right to Kill Game in Defense of Person or Property*, 93 A.L.R.2d 1366, 1374 (1964).

101. See, e.g., *State v. Rathbone*, 100 P.2d 86 (Mont. 1940) (stating that the use of force need be reasonably necessary to protect one's property); *Cross v. State*, 370 P.2d 371, 378 (Wyo. 1962) (finding that in order to kill wild game it must be reasonably necessary to do so).

102. See J. C. Vance, Annotation, *Right to Kill Game in Defense of Person or Property*, 93 A.L.R.2d 1366, 1374-75 (1964) (summarizing that "[i]t has been ruled in some cases that before a plea of justification for killing a protected wild animal may be asserted and heard it must be shown that all other remedies provided by law were first exhausted by the person doing the killing"); see also *United States v. Darst*, 726 F. Supp. 286, 288 (D. Kan. 1989) (holding that a landowner should have sought the assistance of a governmental official before he killed a protected great horned owl).

remedies before killing a wild animal, a property owner in the State of Iowa should explore other legal avenues first. For example, a producer should contact the DNR and attempt to get a special shooting permit, as explained in Part V of this Note, before asserting a right to protect the property.<sup>103</sup>

#### V. NEW IOWA REGULATIONS FOR 1997

Citizen complaints to the Iowa DNR regarding deer damage and automobile-deer collisions, and surveys taken by the DNR, resulted in new regulations effective for the 1997 hunting season. The DNR specifically addresses the deer overpopulation problem in the State of Iowa, and has proposed the solution discussed in this section. The new Iowa regulations, found in the Iowa Administrative Code section 571-106.11, address the need to provide additional hunting in certain areas of high concentration.<sup>104</sup> The following section will explore the content of the new regulations and evaluate their adequacy.

In September of 1997, the Natural Resource Commission approved new deer hunting rules that became effective on October 27, 1997.<sup>105</sup> These rules are specifically intended to implement Iowa Code §§ 481A.38, 481A.39, and 481A.48.<sup>106</sup> The new rules regulate two general areas of deer hunting as follows: (1) the elimination of shooting hours;<sup>107</sup> and (2) provisions for row crop and high-value crop producers to obtain additional out of season shooting permits.<sup>108</sup> This Note will concentrate on the provisions allowing additional hunting in high concentration areas. The producer of the crops need not be the owner of the crop land in order to qualify for a depredation permit. The regulation clearly states that the "producer may be the landowner or a tenant, whoever has cropping rights to the land."<sup>109</sup> This provision ensures that the hundreds of Iowa producers who do not own, but instead lease or rent the land that they farm may be able to protect their commodities.<sup>110</sup>

The overall goal of the new regulations is to "reduce damage below excessive levels within a specific time period through a combination of producer-

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103. See *infra* Part V.

104. See IOWA ADMIN. CODE r. 571-106.11 (1997).

105. See IOWA ADMIN. CODE r. 571-106.11 (1997).

106. See *id.*; see *supra* Part III(B).

107. See IOWA ADMIN. CODE r. 571-106.11(1) (1997).

108. See IOWA ADMIN. CODE r. 571-106.11(4)(b)(3) (1997).

109. IOWA ADMIN. CODE r. 571-106.11(2)(a) (1997).

110. This is not a change from the Code's past practice. For example, tenants of land have been able to take advantage of free hunting permits in the place of an owner of the land for protection of their harvest. See IOWA CODE §§ 483A.1(2), 483A.24(b) (1997).

initiated preventive measures and the issuance of deer depredation permits."<sup>111</sup> Therefore, a producer simply may not obtain a permit to shoot deer causing damage, but rather must first attempt to mitigate the damages through the establishment of a management plan.

#### A. Requirements of a Management Plan

If a producer suspects that he or she is suffering a significant loss to a crop, the producer may request that the wildlife bureau examine the crops to determine eligibility.<sup>112</sup> The wildlife bureau then will send a field employee to "inspect and identify the type and amount of crop damage sustained" from the deer.<sup>113</sup> The field employee then will make a determination of whether the damage is excessive or not excessive.<sup>114</sup> By definition, excessive damage occurs when: (1) crop losses are more than \$1500 in one growing season; (2) a crop loss of \$1500 is likely if preventative action is not taken; or (3) crop losses have been documented as greater than \$1500 in previous years.<sup>115</sup>

If the DNR field employee finds that the damage is not excessive, the producer will not be issued a depredation permit, but instead technical advice will be given to the producer to try to help reduce or prevent damage in the future.<sup>116</sup> If the damage is excessive, and the producer agrees to participate in a depredation management plan, a written plan will be developed by the field employee and the producer.<sup>117</sup> The depredation plans will vary depending on the type of crop to be protected. For example, producers of typical agricultural crops in Iowa, such as corn, soybeans, hay, and oats, may be required to first install preventative measures on their farms.<sup>118</sup> Preventative measures may include "harassment of deer with pyrotechnics and cannons, guard dogs, temporary fencing, allowing more hunters, increasing the take of antlerless deer, and other measures that may prove effective."<sup>119</sup> Producers of high-value horticultural crops, such as Christmas trees, fruits, vegetables, nurseries, and nuts, must consider all of the measures that the row-crop farmers do, but also must consider whether permanent fencing is necessary.<sup>120</sup>

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111. IOWA ADMIN. CODE r. 571-106.11(3)(a) (1997).

112. See IOWA ADMIN. CODE r. 571-106.11(3) (1997).

113. *Id.*

114. See *id.*

115. See IOWA ADMIN. CODE r. 571-106.11(2)(b) (1997).

116. See IOWA ADMIN. CODE r. 571-106.11(3) (1997).

117. See *id.*

118. See IOWA ADMIN. CODE r. 571-106.11(3)(a)(1) (1997).

119. *Id.* Pyrotechnics are fireworks or similar displays. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 961 (9th ed. 1986).

120. See IOWA ADMIN. CODE r. 571-106.11(3)(a)(2) (1997).

These depredation management plans are not short-term solutions, but are intended to provide for long-term damage control. The management plans generally will be three-year plans that are monitored annually by the DNR to determine the success rate of the plan.<sup>121</sup> The producer must implement the measures outlined in the plan, or depredation permits will not be issued.<sup>122</sup>

The requirement of a management plan is certainly a positive step toward decreasing the frustration of farmers while increasing the likelihood of the protection of the harvest. Also, it explores more humane alternatives before shooting of the deer is allowed. However, it remains to be seen whether any of the DNR's suggested preventive measures will be effective.

*B. Requirements for Obtaining a Depredation Permit or a Deer Shooting Permit*

Producers of agricultural crops and producers of horticultural crops may be eligible for depredation permits.<sup>123</sup> Depredation permits are not intended to be permanent solutions to the deer overpopulation problem, rather, the permits are only issued "to temporarily reduce deer numbers until long-term preventive measures become effective."<sup>124</sup> Two types of depredation permits may be issued after a management plan is established—a deer depredation license or a deer shooting permit.<sup>125</sup> Deer depredation licenses may be issued to a producer of a crop. The producer then is allowed to designate any hunter to the DNR as having permission to purchase a license for their land. The permit will be sold to the designated hunter as long as that hunter complies with all applicable hunting regulations, pays for the license, and only hunts in the area allowed by the depredation license.<sup>126</sup> One individual may obtain up to two depredation licenses if given permission by the producer.<sup>127</sup> Depredation licenses are sold in groups of five licenses, and the number of licenses allowed on a producer's land will depend on the need as documented by the management plan.<sup>128</sup> A depredation license may only be used to shoot an antlerless deer.<sup>129</sup> The killing of an antlerless, younger deer has a greater chance of reducing the deer herd numbers than would the killing

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121. See IOWA ADMIN. CODE r. 571-106.11(3)(b) (1997).

122. See IOWA ADMIN. CODE r. 571-106.11(3)(b)(3) (1997).

123. See IOWA ADMIN. CODE r. 571-106.11(4)(a) (1997).

124. IOWA ADMIN. CODE r. 571-106.11(3)(a)(3) (1997).

125. See IOWA ADMIN. CODE r. 571-106.11(4)(a)-(b) (1997).

126. See IOWA ADMIN. CODE r. 571-106.11(4)(a), 106.11(4)(a)(6) (1997).

127. See IOWA ADMIN. CODE r. 571-106.11(4)(a)(2) (1997).

128. See IOWA ADMIN. CODE r. 571-106.11(4)(a)(1) (1997).

129. See IOWA ADMIN. CODE r. 571-106.11(4)(a)(4) (1997).

of an antlered, older deer.<sup>130</sup> A hunter who kills a deer under the depredation license program may keep any deer legally tagged with the depredation license.<sup>131</sup> The depredation license must be used during the regular deer season, or as allowed by the specific license.<sup>132</sup>

Another alternative to a depredation license under the new 1997 regulations is a deer shooting permit. A deer shooting permit may be obtained by producers of high-value horticultural crops and other agricultural producers only if damage cannot be controlled by hunting during the regular hunting seasons.<sup>133</sup> These permits are issued directly to the producer, or designee approved by the DNR, who may shoot as many deer as needed, up to the number specified on the permit.<sup>134</sup> Thus, a benefit of the deer shooting permit is that the producer himself may guard his crop and shoot any offending deer, instead of merely allowing each hunter to shoot one deer as allowed by the depredation permit. Deer shooting permits are available to producers of regular agricultural crops from September 1 through October 31 of each year, while the permits are available to producers of high-value horticultural crops from August 1 through March 31.<sup>135</sup>

Deer shooting permits and depredation licenses are not general licenses to slaughter the deer population. First, the number of deer to be killed will be specified on the permit, and the number is such as to fulfill the goals of the management plan.<sup>136</sup> Second, the licenses are valid only on the land where damage is occurring, or the property immediately adjacent to where the damage is occurring.<sup>137</sup> Third, the deer killed with these licenses are to be used for consumption only.<sup>138</sup> No producer may keep more than two deer, and if a deer cannot be consumed by the producer or the hunter, it must be offered to the public, with charitable organizations having the first opportunity to claim the deer.<sup>139</sup> Therefore, it is not inhumane to handle the deer population in this way, but a necessary form of population control.

The depredation license and shooting permit guidelines propose to eliminate the problem of deer in high concentration areas. By issuing permits in the high

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130. See Allen Farris, Administrator, Iowa Department of Natural Resource, Speech at Drake University Law School, Natural Resources Law (Oct. 10, 1997). A younger deer will live longer and produce more offspring in its life span than an older deer will. The older deer have already passed their reproductive prime, and thus are less likely to have a big effect on the population trend. See *id.*

131. See IOWA ADMIN. CODE r. 571-106.11(4)(a)(5) (1997).

132. See IOWA ADMIN. CODE r. 571-106.11(4) (1997).

133. See IOWA ADMIN. CODE r. 571-106.11(4)(b) (1997).

134. See IOWA ADMIN. CODE r. 571-106.11(4)(b)(2) (1997).

135. See IOWA ADMIN. CODE r. 571-106.11(4)(b)(3) (1997).

136. See IOWA ADMIN. CODE r. 571-106.11 (1997).

137. See IOWA ADMIN. CODE r. 571-106.11(4)(c) (1997).

138. See IOWA ADMIN. CODE r. 571-106.11(5) (1997).

139. See *id.*

concentration areas, a producer of crops will experience less damage to crops. Maybe more importantly, by eliminating many of the deer in high concentration areas, the chance of an automobile-deer collision also will decrease. Therefore, if the new 1997 regulations are given time to work and citizens take advantage of these regulations, the issuing of shooting and depredation permits may solve, or at least reduce the concentration of Iowa's deer population,<sup>140</sup> and in doing so, will protect the health, safety and welfare of its citizens and their environment.

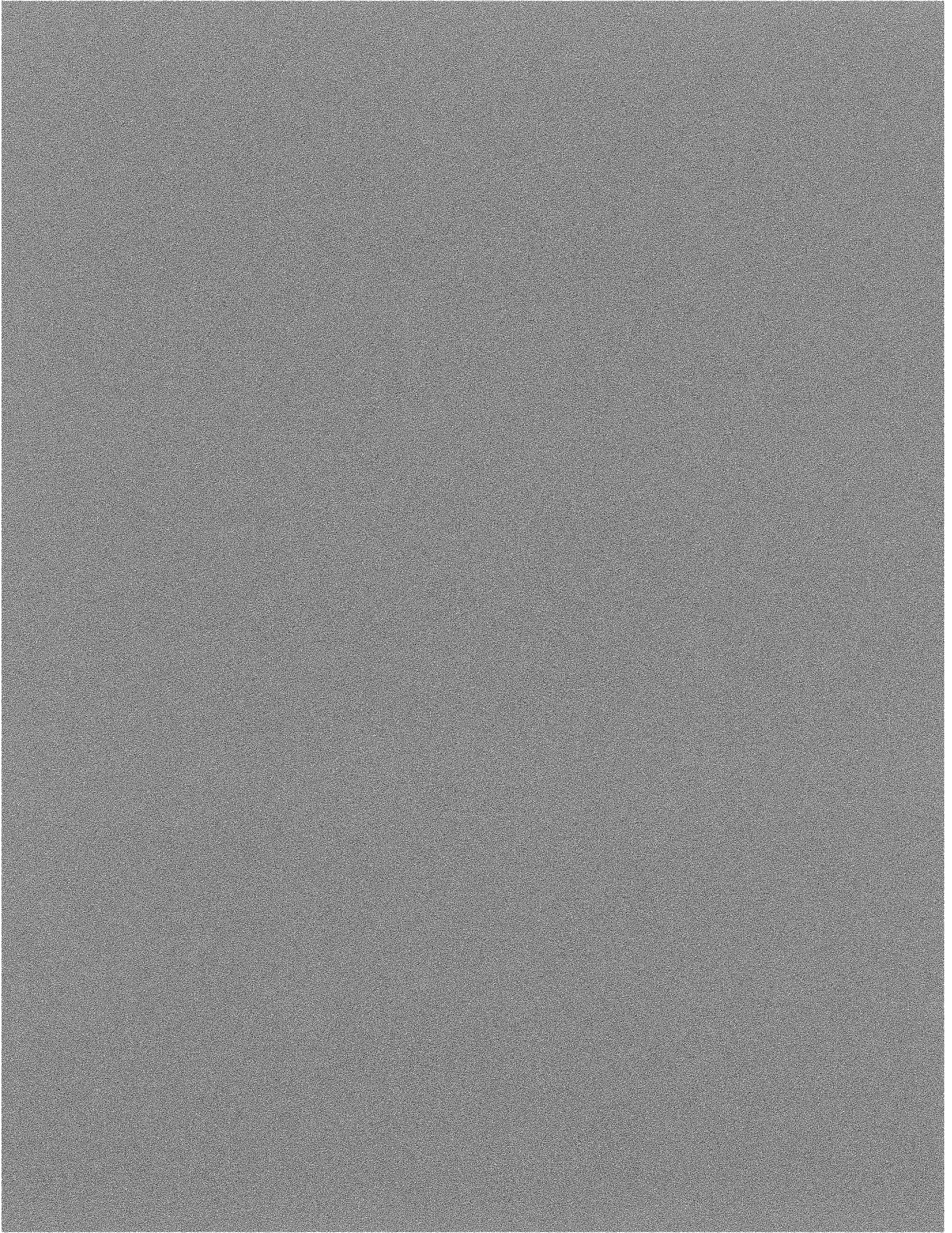
## VI. CONCLUSION

With the population trends of the white tailed deer are greatly increasing in the State of Iowa, it is obvious that measures need to be taken to control the deer population. Regulations recently put into force by the Iowa Department of Natural Resources in October of 1997 are a great start to reduce the damage to person and property that these creatures are causing. After analyzing the current state law and comparing the Iowa Department of Natural Resources' proposals with other viable options, the Iowa DNR, with the help of public participation, has done a good job of assessing the current problem. By continually increasing the numbers of deer hunting permits issued, and by granting shooting and depredation permits to property owners with high concentrations of deer, the DNR can cheaply and efficiently manage Iowa's deer population. If the new measures work as intended, the deer population may be on its way to a reasonable level within the next few years. With the population under control, motorists and property owners statewide will be safer, property damages will be minimized, and the ecosystem balance may be restored.

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140. See Juli Probasco-Sowers, *Deer Population Above 'Tolerance' Level*, DES MOINES REG., Nov. 30, 1997, at 15A. This article quotes Willy Suchy, a DNR wildlife biologist as stating that the "numbers of deer will fall back into the tolerable range after this year's and next year's deer hunting seasons." *Id.*





IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1998

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GERALD GIRRES, *et al.*,  
*Petitioners,*

v.

CLARENCE BORMANN, *et al.*,  
*Respondents.*

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Petition for a Writ of Certiorari to the  
Supreme Court of Iowa

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**PETITION FOR A WRIT OF CERTIORARI**

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### QUESTION PRESENTED

Are "right to farm" laws—enacted by all fifty States—facially unconstitutional as a *per se* taking in violation of the Takings Clause of the Fifth Amendment to the United States Constitution?

**PARTIES TO THE PROCEEDINGS**

Petitioners, intervenors before the District Court for Kossuth County and intervenors-appellees before the Iowa Supreme Court, are Gerald Girres, Joan Girres, Mike Girres, Norma Jean Thul, Jerald Thilges, Shirley Thilges, Thelma Thilges, Edwin Reding, Ralph Reding, Loretta Reding, Bernard Thilges, Jacob Thilges, John Goecke, and Patricia Goecke. The Board of Supervisors for Kossuth County and Joe Rahm, Al Dudding, Laurel Fantz, James Black, and Donald McGregor—in their capacities as members of the Board of Supervisors—were defendants before the District Court and appellees before the Iowa Supreme Court, and are respondents in this Court under S. Ct. Rule 12.6. They supported petitioners' position below.

Respondents Clarence Bormann, Caroline Bormann, Leonard McGuire, and Cecelia McGuire were plaintiffs before the District Court and appellants before the Iowa Supreme Court.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1998

\_\_\_\_\_  
No. 98-\_\_\_\_\_  
\_\_\_\_\_

GERALD GIRRES, *et al.*,  
v. *Petitioners,*

CLARENCE BORMANN, *et al.*,  
\_\_\_\_\_  
*Respondents.*

Petition for a Writ of Certiorari to the  
Supreme Court of Iowa

\_\_\_\_\_  
**PETITION FOR A WRIT OF CERTIORARI**  
\_\_\_\_\_

Petitioners Gerald Girres, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the Iowa Supreme Court in this case.

**OPINIONS BELOW**

The opinion of the Iowa Supreme Court is reported at 584 N.W.2d 309 and reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court for Kossuth County is unreported and reproduced at App. 27a. The order of the Board of Supervisors for Kossuth County is unreported and reproduced at App. 63a.

**JURISDICTION**

The judgment of the Iowa Supreme Court was entered on September 23, 1998. App. 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment to the United States Constitution provides that "nor shall private property be taken for public use without just compensation." The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall \* \* \* deprive any person of life, liberty, or property, without due process of law." The pertinent provisions of Iowa's right to farm law, Iowa Code § 352, are reproduced at App. 65a-71a.

### RULE 29.4(c) STATEMENT

Pursuant to S. Ct. Rule 29.4(c), petitioners note that this proceeding calls into question the constitutionality of Iowa Code § 352.11(1)(a), and that neither the State of Iowa nor any agency, officer, or employee thereof is a party. Accordingly, 28 U.S.C. § 2403(b) is applicable and petitioners have served this petition on the Attorney General of Iowa.

### INTRODUCTION

Every State in the Union has enacted a "right to farm" law to help preserve agricultural land in the face of suburban sprawl and other pressures on agriculture and agricultural land. Like the Iowa law at issue in this case, those laws typically provide farmers a qualified defense to nuisance actions brought by nearby residents complaining about the normal incidents of today's farm life. In this case the Iowa Supreme Court held that Iowa's right to farm law violated the Takings Clause of the Federal Constitution because it effected an uncompensated taking of the nearby residents' right to bring such a nuisance action. The court reached this conclusion even though the record was devoid of any indication that the nuisance defense had been triggered, and without engaging in the balancing of competing interests that this Court has held is normally required in assessing federal takings claims. Instead, the court struck down the Iowa law on its face as a *per se*

taking—a category this Court has held is restricted to governmental actions that either deprive a landowner of all economic use of property or physically invade the property that has been “taken.” The Iowa Supreme Court thus expressly departed from this Court’s precedents and held that a government regulation that did not effect a physical invasion or deprive the landowner of all economic use may nonetheless constitute a taking *per se*.

The decision of the Iowa Supreme Court not only conflicts sharply with this Court’s takings jurisprudence, but calls into question the constitutionality of right to farm laws in each of the other 49 States. This Court should grant certiorari to confirm that the legislative adjustment of competing land use claims embodied in right to farm laws is not a *per se* violation of the United States Constitution.

#### STATEMENT OF THE CASE

The American experiment is rooted in no small measure in the agrarian ideal. In 1790 ninety-five percent of the population lived in a rural, agricultural setting. Agriculture was key to the Nation’s fledgling economy, and the family farm critical to many citizens’ survival. To many—most notably, Thomas Jefferson—farming was thought to be indispensable to cultivating the democratic values and ideals necessary to sustain the new Republic. De Tocqueville called America’s agrarian character “one of the first causes of the maintenance of republican institutions in the United States.” *I Democracy in America* 290 (Vintage Books ed. 1990). In time, of course, agrarianism gave way to industrialism and a more urban society, but the agrarian ideal remains fixed in our national psyche, and agriculture and the family farm continue to play a vital role in the Nation’s economy.

With the decline of agrarianism, federal and state governments have legislated numerous programs aimed at assisting farmers and promoting agricultural activities in this country. In the late 1970s and early 1980s, States began passing “right to farm” laws in response to the

pressures that suburban sprawl and other developments imposed on existing farming operations. These laws—which have been adopted by every State, *see* App. 72a-73a—seek to protect farms from the pressures of a more urbanized society, thereby preserving each State's agricultural base. Though varying in their particulars, right to farm laws typically afford farmers a qualified defense to nuisance actions brought by neighbors who object to the normal incidents of today's farming operations.

Iowa enacted its right to farm law in 1982 pursuant to the State's policy "to provide for the orderly use and development of land and related natural resources in Iowa." Iowa Code § 352.1. The stated purpose of the law is to preserve "the state's finite supply of agricultural land" by allowing "establishment of agricultural areas in which substantial agricultural activities are encouraged, so that land inside these areas \* \* \* is conserved for the production of food, fiber, and livestock, thus assuring the preservation of agriculture as a major factor in the economy of this state." *Id.* To advance this end, Section 352.11(1)(a) of the law provides that "[a] farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation."<sup>1</sup>

The nuisance defense provided by Section 352.11(1)(a) is, however, not absolute. It applies only to land used for agricultural production, and is not available if: (1) the nuisance results from a farm operation determined to be in violation of a federal or state statute or rule; (2) the nuisance results from the negligent operation of the farm;

<sup>1</sup> Under the statute, an owner of farmland may submit an application with a county board to have land designated an "agricultural area" subject to the Act. Iowa Code § 352.6. The county board must give notice of an application to form an agricultural area. *Id.* § 352.7. After the agricultural area has been in place for six years, an owner may withdraw land from a designated agricultural area upon notice to the same county board. *Id.* § 352.9.

(3) the injury or damage complained of occurred before the creation of the agricultural area; or (4) the damage complained of was caused by pollution or a change in conditions of the waters of a stream, the “overflowing” of the objecting person’s land, or excessive soil erosion onto that person’s land. Iowa Code § 352.11(1)(b).

The facts in this case are not in dispute. In January 1995, petitioners, individuals who own 960 acres of land in Kossuth County, Iowa, requested that the Kossuth County Board of Supervisors designate their land as an agricultural area within the meaning of the state law. *Id.* § 352.6. The Board found that the proposed agricultural area met the statutory requirements and was consistent with the purposes set forth by the Iowa General Assembly, and approved petitioners’ request. App. 63a. Respondents—petitioners’ neighbors—challenged the Board’s approval of the agricultural area in Kossuth County District Court. They alleged, among other things, that the Board’s action deprived them of property without just compensation under both the Federal and Iowa Constitutions, App. 40a, on the ground that the designation of the land as an agricultural area automatically entitled petitioners to “nuisance immunity,” even though respondents presented “neither allegations nor proof of nuisance.” App. 6a.

The District Court rejected that contention. It began its analysis by noting that the plaintiffs were mounting “a facial challenge” to the law, and that “[i]t is not alleged that any of the [petitioners] are at this time maintaining a nuisance upon their premises.” App. 34a. The court explained that this Court’s precedents found a *per se* taking only in cases of physical invasion or when government regulation deprived a landowner of all economically viable uses of property. The court noted that the Iowa right to farm law neither effected a physical invasion of any property, nor deprived neighboring landowners of all uses of their property. As the District Court explained, “[t]he Supreme Court has been markedly disinclined to find a

regulatory taking where only one or two sticks in the 'bundle of rights' that are part and parcel of the ownership of real property have been impaired," and here "the challenged legislation impairs but does not eliminate one of the many 'sticks' in the bundle of rights, and \* \* \* represents the legislature's judgment in adjusting property rights, but does not amount to a taking." App. 46a.

The District Court also reviewed precedents considering whether the establishment of a nuisance could constitute a taking, but concluded that the plaintiffs could not rely on such a theory in a facial challenge. As the court explained, "[w]hether the operation of a farming enterprise in an agricultural area in the future, absent negligence and in conformity with State and Federal environmental regulations could rise, as applied, to a nuisance and a 'taking' under the Fifth Amendment, cannot now be decided." App. 54a. The District Court later denied plaintiffs' request for reconsideration. App. 60a.

The Iowa Supreme Court reversed. That court ruled that the Board's action in creating the agricultural area, thereby permitting petitioners to assert the nuisance defense under Iowa Code § 352.11(1)(a) in the event they were sued for nuisance and none of the statutory exceptions applied, was an unconstitutional *per se* taking under the Fifth Amendment to the United States Constitution and Article I, Section 18 of the Iowa Constitution. The court began its analysis by noting that "the facts are not in dispute" and that the "only question is a legal one." App. 5a. It also recognized that respondents' challenge was "a facial one because [they] have presented neither allegations nor proof of nuisance." App. 5a-6a.

The Iowa Supreme Court noted that two categories of government action require compensation without any inquiry into additional factors: (1) a physical invasion, or (2) regulation that denies all economically beneficial use of the property. App. 14a (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)). Respond-

ents conceded that the latter category was inapplicable, so the only issue before the court was whether the Iowa right to farm law was, on its face, a *per se* taking as a physical invasion of respondents' property. App. 14a-15a. The court concluded that it was, relying on precedents from the early twentieth century for the proposition that the authorization of a private nuisance satisfied the physical invasion test. App. 16a-24a. Based on these precedents, the court concluded that a physical taking or touching is not necessary to meet the physical invasion standard for a *per se* taking under *Lucas*. The court then held that the appropriate remedy was to hold "that portion of Iowa Code section 352.11(1)(a) that provides for immunity against nuisances unconstitutional and without any force or effect." App. 25a. Because respondents "seek no compensation," the Iowa Supreme Court struck down the law under the Federal Constitution without engaging in any analysis of what "just compensation" would be. App. 26a. The court "recognize[d] that political and economic fallout from our holding will be substantial," but concluded that "the challenged scheme is plainly—we think flagrantly—unconstitutional." *Id.*<sup>2</sup>

#### REASONS FOR GRANTING THE WRIT

One of the principal considerations governing the exercise of this Court's discretion to grant certiorari is whether a state high court "has decided an important federal question in a way that conflicts with relevant decisions of this

<sup>2</sup> The Iowa Supreme Court concluded that the right to farm law was unconstitutional under the Fifth Amendment to the Federal Constitution and Article 1, Section 18 of the Iowa Constitution, App. 24a, which also provides that "[p]rivate property shall not be taken for public use without just compensation." Under *Michigan v. Long*, 463 U.S. 1032 (1983), the citation of the Iowa Constitution does not constitute an independent state ground precluding review in this Court of the Fifth Amendment ruling. This is particularly true since there is no dispute that the federal and Iowa takings clauses have the same meaning and scope.

Court.” S. Ct. Rule 10(c). *See, e.g., Barker v. Kansas*, 503 U.S. 594, 597 (1992); *Arizona v. Mauro*, 481 U.S. 520, 525 (1987); *Pennsylvania v. Goldhammer*, 474 U.S. 28, 28 (1985) (per curiam); *Michigan v. Clifford*, 464 U.S. 287, 289 (1984). As we explain below, the decision of the Iowa Supreme Court in this case squarely conflicts with this Court’s decisions in at least two fundamental respects. First, the decision conflicts with this Court’s precedents on when a facial takings challenge brought pursuant to the Fifth Amendment is appropriate for judicial resolution. Second, and in any event, the decision conflicts with this Court’s precedents on when a *per se* taking has been effected under the Fifth Amendment. Certiorari is warranted to resolve each of these conflicts, especially in view of the fact that the Iowa Supreme Court’s decision calls into question the constitutionality of right to farm laws found in every State of the Union.

**I. THE IOWA SUPREME COURT’S DECISION CONFLICTS WITH THIS COURT’S DECISIONS ON THE MINIMUM FACTUAL RECORD NECESSARY TO ADJUDICATE A TAKINGS CLAIM.**

This Court has “oft-repeated \* \* \* that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary.” *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 294-295 (1981). *See Rescue Army v. Municipal Court*, 331 U.S. 549, 570 n.34 (1947) (“If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality \* \* \* unless such adjudication is unavoidable.”) (citation omitted); *Alabama State Fed’n of Labor v. McAdory*, 325 U.S. 450, 461 (1945) (Court’s “considered practice [is] not to decide abstract, hypothetical or contingent questions \* \* \* or to decide any constitutional question in advance of the necessity for its decision \* \* \* or to decide any constitutional question except with reference

to the particular facts to which it is to be applied") (citations omitted). "Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking." *Virginia Surface Mining*, 452 U.S. at 295. The Iowa Supreme Court flagrantly disregarded this fundamental rule of adjudicating federal takings claims, holding the State's right to farm law "unconstitutional and without any force or effect," App. 25a, on a record containing absolutely no indication that the statute had been triggered, or how the statute will operate if and when it is.

In *Pennell v. City of San Jose*, 485 U.S. 1 (1988), the Court applied this rule in declining to adjudicate a facial takings challenge to a California municipality's rent control ordinance. The ordinance authorized a local official, in assessing the reasonableness of a proposed rent increase, to consider, among other factors, whether the increase imposed an "economic and financial hardship" on the tenant. *Id.* at 4-6. A landlord and landlord association brought suit in state court, contending that the ordinance's "tenant hardship" provision was "facially unconstitutional" under the Fifth and Fourteenth Amendments to the Constitution. *Id.* at 4 (quotation omitted).

The California Supreme Court considered the landlords' claim and concluded that the ordinance did not violate the Fifth Amendment. This Court, however, held that it "would be premature to consider [the landlords' facial challenge] on the present record." *Id.* at 9. The Court explained that, "[a]s things stand, there is simply no evidence that the 'tenant hardship clause' has in fact ever been relied upon by a hearing officer to reduce a rent below the figure it would have been set at on the basis of the other factors set forth in the Ordinance," and that there was "nothing in the Ordinance requiring that a hearing officer in fact reduce a proposed rent increase on grounds of tenant hardship." *Id.* at 9-10. Emphasizing that this Court has "found it particularly important in takings cases to adhere to our admonition that 'the con-

stitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary,” *id.* at 10 (quoting *Virginia Surface Mining*, 452 U.S. at 294-295), the Court held that “the mere fact that a hearing officer is enjoined to consider hardship to the tenant in fixing a landlord’s rent, without any showing in a particular case as to the consequences of that injunction in the ultimate determination of the rent, does not present a sufficiently concrete factual setting for the adjudication of the takings claim appellants raise here.” *Id.*<sup>3</sup>

*Pennell* thus establishes that a facial takings challenge should not be entertained where it is not clear from the record whether, when, or how the provision at issue will be applied, or what the precise impact of applying the challenged provision will be on the property rights at issue. See also *Virginia Surface Mining*, 452 U.S. at 296 & n.37 (facial takings challenge was “premature” where “appellees made no showing in the [trial court] that they own tracts of land that are affected by th[e] [challenged] provision”); cf. *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (finding facial takings claim “ripe” where adjudication of claim did not require Court to address “the extent to which [plaintiffs] are deprived of \* \* \* their particular pieces of property or the extent to which these particular [plaintiffs] are compensated”).<sup>4</sup>

<sup>3</sup> The fact that the landlords had “specifically alleged in their complaint that [their] properties are ‘subject to the terms of’ the Ordinances” was sufficient to confer Article III *standing* on the landlords to raise their Fifth Amendment claim, but did not create an adequate record to adjudicate that claim—even though it was made in facial terms. 485 U.S. at 7 (quoting complaint).

<sup>4</sup> Lower courts have correctly interpreted *Pennell* to require an adequate factual record for the adjudication of takings claims. See, e.g., *Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 506 & n.9 (9th Cir. 1990) (citing *Pennell* for proposition that Supreme Court “has noted that certain facial challenges are impossible to evaluate absent some factual information regarding how the statute will be applied,” and that “some regulations, by their

Under the rule of *Pennell*, the Iowa Supreme Court should have held that respondents' facial takings claim is premature, as did the state district court below. Section 352.11(1)(a) provides a defense to nuisance actions in certain limited situations. As the Iowa Supreme Court recognized, respondents did not present any proof or even allege that petitioners' activities have created or will create a nuisance. *See App. 5a-6a*. Respondents have not filed any nuisance action, and petitioners accordingly have not had occasion to assert Section 352.11(1)(a) as a defense. The mere possibility (or even likelihood) that someone will operate a farm or conduct a farm operation in this particular agricultural area in such a manner as to create an actionable nuisance that does not fall under one of the enumerated exceptions listed in Section 352.11(1)(b), and that an aggrieved party will be unable to seek redress because of Section 352.11(1)(a), does not make respondents' facial takings challenge appropriate for judicial resolution at this time. A similar likelihood existed with respect to the tenant hardship provision challenged in *Pennell*, but the Court determined that it was "premature" to consider the landlords' claim that the provision, on its face, effected a taking. 485 U.S. at 9.

*Pennell* makes clear that a takings claim should not be evaluated unless the record is sufficiently developed to permit the court to determine the precise nature and extent of the taking alleged. As the District Court below recognized, that record is plainly absent here. *See App. 45a-46a*.

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very nature, are just not subject to facial attack on takings grounds \* \* \* [p]rior to their application"), *cert. denied*, 502 U.S. 943 (1991); *Tenoco Oil Co. v. Department of Consumer Affairs*, 876 F.2d 1013, 1026 n.18 (1st Cir. 1989) ("*Pennell* reflects the Court's continuing reluctance to treat incomplete action as a taking."); *Hammond v. Baldwin*, 866 F.2d 172, 178 (6th Cir. 1989) (citing *Pennell*, among other cases, for proposition that Supreme Court has repeated caveat that "[t]here is no injury to complain of until the state's action is 'complete'").

The importance of requiring a property owner to show with particularity the exact nature and extent of the alleged taking—even in the context of a facial challenge brought under the Fifth Amendment—cannot be overstated. As this Court has observed, “[t]he question of what constitutes a ‘taking’ for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty.” *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978). No answer is possible, of course, unless a court knows precisely what activity constitutes the alleged taking. See *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 350-351 (1986). As the Court recognized in *Pennell*, that answer is typically not available in the absence of facts establishing how the challenged statute or ordinance has been (or is likely to be) applied. See 485 U.S. at 10-11; see also *Virginia Surface Mining*, 452 U.S. at 296 & n.37.

Even when government-sanctioned activities constitute a nuisance within the meaning of state law, there are numerous additional factors that must be taken into account in determining whether a taking has occurred within the meaning of the Fifth Amendment, including whether the challenged activities are trespassory or nontrespassory in nature, the duration and intensity of the challenged activities, and the extent to which they diminish a property owner’s use and enjoyment of property. In the absence of a record establishing such facts, judicial resolution of the constitutionality of statutes allegedly effecting a taking is premature and—as decisions like *Pennell* and *Virginia Surface Mining* establish—inappropriate.<sup>5</sup>

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<sup>5</sup> This reasoning lies at the heart of this Court’s decisions involving as applied, regulatory takings claims. The Court has held that “a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.” *Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). This

A factual record establishing the nature and extent of the taking alleged is indispensable for another reason. The Takings Clause provides that “private property [shall not] be taken for public use, without just compensation.” U.S. Const. amend. V, § 1, cl. 5. Thus, as this Court has recognized, the Takings Clause does not prohibit the government from condemning private property for public use; rather, it merely places a condition on the government’s power to do so by requiring it to pay “just compensation.” See *Preseault v. ICC*, 494 U.S. 1, 11 (1990); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987). Where, as here, a State “provides an adequate procedure for seeking just compensation, [a] property owner cannot claim a violation of the [Takings Clause] until it has used the procedure and been denied just compensation.” *Williamson County Regional Planning Comm’n*, 473 U.S. at 194-195.<sup>6</sup> A court cannot determine whether a property owner has been denied just compensation, however, unless it can

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ripeness requirement is necessary because a regulatory taking occurs when a regulation has gone “too far,” and a court cannot make this determination “unless it knows how far the regulation goes.” *MacDonald*, 477 U.S. at 348.

<sup>6</sup> Thus, the Iowa Supreme Court erred in another respect. Once it determined—erroneously, for the reasons we explain in Part II, *infra*—that Section 352.11(1)(a) effected a taking, the court should have afforded the government the option of paying respondents “just compensation,” instead of declaring that the provision was unconstitutional and had no force or effect. See *First English*, 482 U.S. at 321 (once a court determines that a taking has occurred government can either amend or withdraw regulation or choose to exercise eminent domain); Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure*, § 15.14, at 520 (2d ed. 1992) (“Once it is determined that the government regulation or action constitutes a taking for which compensation is due, the government could choose to continue the action or regulation and pay fair market value for the permanent taking of the property.”).

determine from the record the nature and extent of the taking at issue.<sup>7</sup>

In this case, the Iowa Supreme Court's failure to follow this Court's precedents—and in particular *Pennell*—led it to reach out and strike down pursuant to the Fifth Amendment a statutory provision found in each of the fifty States' right to farm laws without any factual showing whatsoever that such a decision was necessary, and without any factual basis upon which to properly evaluate the existence or extent of the taking alleged. This Court should grant certiorari to resolve the conflict between the Iowa Supreme Court's decision and this Court's own decisions on the minimum factual record necessary to adjudicate a facial takings claim under the Fifth Amendment.

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<sup>7</sup> *United States v. Causby*, 328 U.S. 256 (1946), illustrates this point. In that case, the owners of a chicken farm claimed that their property had been taken within the meaning of the Takings Clause by frequent and regular flights of military aircraft at low altitudes over their property. The chicken farmers had been forced to abandon their chicken business because the low-level flights had caused their chickens to fly into the walls from fright. The Court of Claims held that by virtue of the flights the government had taken an easement over the farmers' property. *Id.* at 258-259. On appeal, this Court agreed that the flights' interference with the chicken farmers' use of their property created an easement in the government's favor requiring the payment of just compensation. *Id.* at 267. The Court remanded the case for a determination of "just compensation" however, because a "precise description as to [the] nature" of the easement was not clear from the record. *See id.* at 267-268. The record failed to show either the frequency of the flights, the altitudes of the flights, or the type of aircraft involved to an extent that would permit the Court to determine what compensation was "just." *See id.* at 267.

**II. THIS COURT SHOULD GRANT THE PETITION TO CLARIFY THE LIMITED RANGE OF GOVERNMENTAL ACTIONS THAT CAN BE CLASSIFIED AS PHYSICAL INVASIONS AND THEREFORE PER SE TAKINGS.**

In any event, even assuming the Iowa Supreme Court properly considered respondents' facial challenge to the Iowa right to farm law, its decision holding that the statute effects a *per se* taking in violation of the Fifth Amendment is dramatically out of step with this Court's takings jurisprudence. The Iowa Supreme Court recognized that this Court has identified "two categories of state action that *must* be compensated without any further inquiry into additional factors." App. 13a (emphasis in original). As the Court explained in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), "[t]he first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property." *Id.* at 1015 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). The second *per se* taking category covers cases "where regulation denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015. In these two narrow categories of cases, a compensable taking is found without further inquiry into the economic impact of, and the governmental purpose for, the regulation at issue.

In the courts below, respondents made no claim "that the challenged statute denies them all economically beneficial or productive use of their property," App. 14a, and the Iowa Supreme Court accordingly purported to "restrict [its] discussion to the physical invasion category." App. at 15a. The court briefly discussed "[t]respasory invasions of private property by government enterprise," App. at 15a-16a, but did not suggest that it viewed the existence of Iowa's right to farm law as such an invasion. The conclusion that there was no trespassory—*i.e.*, physi-

cal—invasion should have ended the court's consideration of whether the law effected a *per se* taking.

Instead, the Iowa court turned to a discussion of what it called “[n]ontrespassory invasions of private property by government enterprise.” App. 16a (emphasis added).<sup>8</sup> The court reviewed older takings cases from this Court,<sup>9</sup> from which it gleaned the conclusion that a *per se* taking could occur where there is *no* physical invasion of property and where the owner does not claim that he has been deprived of all productive use of that property. This conclusion represents an unwarranted and dramatic expansion of the *per se* taking doctrine, conflicts with this Court’s decision in *Lucas*, and is contrary to this Court’s repeated admonition that the category of cases in which a *per se* taking may be found is “very narrow.” *Loretto*, 458 U.S. at 441. See, e.g., *Yee v. City of Escondido*, 503 U.S. at 538-539; *FCC v. Florida Power Corp.*, 480 U.S. 245, 252-253 (1987); *Southview Assocs. v. Bongartz*, 980 F.2d 84, 93 (2d Cir. 1992) (*Yee* and *Florida Power* “confirm the narrow scope of so-called physical takings”), *cert. denied*, 507 U.S. 987 (1993); *Alaska Dep’t of Natural Resources v. Arctic Slope Reg’l Corp.*, 834 P.2d 134, 142

<sup>8</sup> Citing John W. Shonkwiler & Terry Morgan, *Land Use Litigation*, § 10.02(2) (1986), the court began its discussion with the observation that “[t]o constitute a *per se* taking, the government need not physically invade the surface of the land.” App. 16a. The treatise it cited, however, was not expressly referring to *per se* takings. This mistaken citation, which is in direct conflict with the teachings of *Lucas*, forms the basis for the court’s confusion throughout the remainder of its opinion between a taking and a *per se* taking.

<sup>9</sup> See App. 16a-20a (citing *United States v. Causby*, 328 U.S. 265 (1946); *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922); *United States v. Welch*, 217 U.S. 333 (1910); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914)). The court also cited *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987), in its discussion, App. 19a. See *infra* at 20-21 (distinguishing *Nollan*).

(Alaska 1991) (“The category of *per se* takings is a narrow one”).

The vast majority of courts, both state and federal, have recognized that, where a property owner is not denied all productive use of property, it is only a *physical* invasion of the property that constitutes a *per se* taking.<sup>10</sup> A physical taking, the Court has held, occurs “only where [the government] *requires* the landowner to submit to a physical *occupation* of his land.” *Yee*, 503 U.S. at 527 (first and third emphases added). In *Loretto*, the Court explained at length why physical invasions are subjected to *per se* treatment. 458 U.S. at 435-438. In addition to the historical support for such treatment, the Court relied on its findings that: (1) “[s]uch an appropriation is perhaps the most serious form of invasion of an owner’s property interests,” destroying the ability to exercise the basic ownership rights of possession, use, and disposal, *id.* at 435-436; (2) “an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner’s property,” *id.* at 436 (emphasis in original); (3) the *per se* rule would avoid difficult line-drawing problems with respect to how much of a physical invasion there

<sup>10</sup> See, e.g., *Philip Morris, Inc. v. Harshbarger*, 159 F.3d 670, 674 (1st Cir. 1998); *Vesta Fire Ins. Co. v. Florida*, 141 F.3d 1427, 1431 (11th Cir. 1998) (government’s action not in “*per se* takings category” where “neither a physical invasion nor a denial of *all* beneficial use of ‘property’ has been shown”) (emphasis in original); *Garneau v. City of Seattle*, 147 F.3d 802, 809 (9th Cir. 1998); *Outdoor Graphics, Inc. v. City of Burlington*, 103 F.3d 690, 693-694 (8th Cir. 1996); *Texas Manufactured Housing Ass’n v. City of Nederland*, 101 F.3d 1095, 1105 n.11 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 2497 (1997); *Branch v. United States*, 69 F.3d 1571, 1576 (Fed. Cir. 1995), *cert. denied*, 117 S. Ct. 55 (1996); *Westling v. County of Mille Lacs*, 581 N.W.2d 815, 823 (Minn. 1998); *San Diego Gas & Elec. Co. v. Superior Court*, 920 P.2d 669, 698 (Cal. 1996); *Garrett v. City of Topeka*, 916 P.2d 21, 30 (Kan. 1996); *Parking Ass’n of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200, 202 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995); *Anchorage v. Sandberg*, 861 P.2d 554, 557 (Alaska 1993).

must be to have a taking, *id.* at 436-437; and (4) “whether a permanent physical occupation has occurred presents relatively few problems of proof.” *Id.* at 437.<sup>11</sup>

These factors are not implicated by Iowa’s right to farm law. The respondents’ ability to possess, use, and dispose of their property has not been destroyed. At the very most, those interests may ultimately be somewhat impaired—to an as-yet unknown or ascertainable extent in the limited circumstances in which the statute actually affords a nuisance defense—if and when activities that would otherwise constitute a nuisance are conducted on the neighboring farmland. The imposition of such an impairment, however, is well within the legislature’s authority to “adjust[] the benefits and burdens of economic life,” *Penn Cent. Transp. Co. v. New York City*, 438 U.S. at 124, without providing compensation. Nor does the right to farm law involve the “direct[] inva[sion] and occup[ation of] the owner’s property” that concerned the Court in *Loretto*. 458 U.S. at 436. Subjecting the right to farm law to *per se* takings treatment, moreover, would generate a host of line-drawing problems as courts struggled to determine which other “nontrespassory invasions of property” should likewise share in that treatment, and would present difficult problems of proof.

While the Iowa Supreme Court paid lip service to the requirement of a physical invasion for purposes of finding a *per se* taking, App. 13a-14a, it considered none of these factors in determining that the existence of the right to farm law resulted in a *per se* taking. Instead, it surveyed cases from this Court, decided long before the advent of modern takings jurisprudence, and determined that the Court “has allowed compensation”—without any inquiry

<sup>11</sup> The *Lucas* Court offered a similar defense of application of the *per se* rule where an owner is deprived of all beneficial use by regulation short of a physical invasion. See 505 U.S. at 1017-19. As noted, no such claim was made here. App. 14a.

into the *Penn Central* factors—for “interferences short of physical taking or touching of land.” App. 18a. These pre-*Penn Central* cases, however, do not support application of the *per se* takings doctrine in the absence of physical invasion or total deprivation of use.

Certainly the decision in *United States v. Causby* does not so hold. While the Iowa Supreme Court cited *Causby* for the proposition that “[t]o constitute a *per se* taking, the government need not physically invade the surface of the land,” App. 16a, *Causby* itself characterized the government’s overflights as “a direct invasion of respondents’ domain.” 328 U.S. at 265-266. This Court has since reaffirmed that *Causby* is a physical invasion case. See *Lucas*, 505 U.S. at 1015 (*Causby* involved “physical invasions of airspace”); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 489 n.18 (1987) (citing *Causby* as a case where “interference with property can be characterized as a physical invasion by government”); *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (*Causby* involved “physical invasion” of easement); *Penn Cent.*, 438 U.S. at 124 (same).

The Iowa Supreme Court also cited *Griggs v. Allegheny Country*, 369 U.S. 84 (1962), and *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922), in support of its view that non-physical invasions short of a wholesale denial of use could constitute *per se* takings. App. 17a. Like *Causby*, however, these cases involved physical invasions of property. See *Griggs*, 369 U.S. at 88 (overflights involve invasion of “air easement”); *Portsmouth*, 260 U.S. at 330 (government responsible for “successive trespass[es]”). This Court has in fact indicated that *Griggs* and *Portsmouth* are of a piece with *Causby*. See, e.g., *Penn Cent.*, 438 U.S. at 128.

Finally, the Iowa Supreme Court relied on *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914), to support its expansive *per se* takings theory. The court

stated that “*Richards* ‘entirely does away with the requirement of a physical taking or touching.’” App. 20a (citation omitted). Whatever else may be said of *Richards*, it seems quite evident that under modern takings jurisprudence the facts of that case would not be considered to involve a *per se* taking, but would be analyzed under the *ad hoc* factual inquiry to which most takings claims, after *Penn Central*, are subjected. Against the backdrop of this Court’s careful delineation of the narrow *per se* takings categories, *Richards*—a case which has not been cited in a majority opinion of this Court for more than half a century—should not be taken to establish a third category of *per se* takings that this Court somehow overlooked in its recent decisions.<sup>12</sup>

Thus, the cases cited by the court below fail to support its holding that the imposition of an easement—no matter what the character of the easement or the regulation—is a *per se* taking. To be sure, this Court has held that regulations involving only an easement may be eligible for *per se* treatment, but those cases are squarely within the physical invasion category of *per se* takings. In *Nollan*, the Court found that the “appropriation of a public easement across a landowner’s premises,” 483 U.S. at 831, would be considered a taking without regard to the balancing of factors that would accompany a regulatory taking because of the physical nature of the invasion: “We think that a ‘permanent physical occupation’ has occurred, for purposes of th[e] [*per se*] rule, where individuals are given a permanent and continuous right to

<sup>12</sup> The Iowa Supreme Court also cited *United States v. Welch*, 217 U.S. 333 (1910), as a “‘clear example’” of a *per se* “‘condemnation without any physical taking.’” App. 19a (quoting William B. Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 Dick. L. Rev. 207, 221 (1967)). *Welch*, however, involved the permanent destruction of an easement of passage—preventing the owners of that easement from physically passing over their right of way along the property—and should therefore be understood to involve a physical invasion.

pass to and fro, so that the real property may be continuously traversed.” *Id.* at 832. Similarly, in *Kaiser Aetna*, the Court held that “even if the Government physically invades only an easement in property, it must nonetheless pay compensation.” 444 U.S. at 180. As that language makes clear, however, it was critical that the government action at issue “will result in an actual physical invasion of the privately owned” property. *Id.* See also *Loretto*, 458 U.S. at 433 (“*Kaiser Aetna* reemphasizes that a physical invasion is a government intrusion of unusually serious character”). Nothing of the sort is at issue here. Indeed, the very fact that the Iowa Supreme Court acknowledged that it was considering a “nontrespassory invasion” should have led it to recognize that the government action was *not* a physical invasion, and that the right to farm law should therefore not have been considered to have effected a *per se* taking.<sup>13</sup>

<sup>13</sup> By definition, a trespass is “an actual *physical* invasion” of land. *Williamson v. Fowler Toyota, Inc.*, 956 P.2d 858, 862 (Okla. 1998); *Leaf River Forest Prods., Inc. v. Simmons*, 697 So.2d 1083, 1085 (Miss. 1996). See also *Restatement (Second) of Torts* § 158 (1965). The classic nuisance, on the other hand, involves a “nontrespassory” invasion. See, e.g., *In re Chicago Flood Litig.*, 680 N.E.2d 265, 278 (Ill. 1997); *Restatement (Second) of Torts* § 821D (1979). Thus, courts—including the Iowa courts—have long distinguished between the cause of action for trespass and for nuisance based on the need for an actual physical invasion. See, e.g., *Ryan v. City of Emmetsburg*, 4 N.W.2d 435, 438 (Iowa 1942) (“Trespass comprehends an actual physical invasion by tangible matter,” whereas “[a]n invasion, which constitutes a nuisance is usually by intangible substances, such as noises or odors”); *Leaf River Forest Prods.*, 697 So.2d at 1085 (while “trespass requires an actual physical invasion of the plaintiff’s property,” the “nuisance cause of action \* \* \* requires no actual physical invasion”); *Wilson v. Interlake Steel Co.*, 649 P.2d 922, 924 (Cal. 1982) (same). In limited circumstances, a physical invasion of property may constitute a nuisance, as well as a trespass. See, e.g., *Russo Farms, Inc. v. Vineland Bd. of Educ.*, 675 A.2d 1077, 1084 (N.J. 1996) (“the flooding of the plaintiff’s land, which is a trespass, is also a nuisance if it is repeated or of long duration”).

The holding that the “taking of easements in the neighbors’ properties,” App. 24a, by operation of the right to farm law is a *per se* taking is also inconsistent with this Court’s determinations that impairing, or even extinguishing, one “strand” in the “bundle” of property rights does not alone constitute a taking. Thus, for example, in *Andrus v. Allard*, 444 U.S. 51, 65 (1979), the Court observed that “the denial of one traditional property right”—here, respondents posit, the right to seek remedies for a nuisance in certain limited instances—“does not always amount to a taking.” Instead, “where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.” *Id.* at 65-66. See also *Keystone Bituminous Coal Ass’n*, 480 U.S. at 497, 500-501; *Penn Cent.*, 438 U.S. at 130-131. As *Nollan* makes clear, it is only where that “strand” involves the right to exclude others from physical occupation of the property—where a physical occupation is authorized—that a *per se* taking results. 483 U.S. at 831. That is not the case here.

The decision of the Iowa Supreme Court is thus a startling departure from this Court’s takings jurisprudence. It embraces a discredited analysis under which each right associated with a particular piece of property is itself viewed as separately subject to being taken by the government. When that narrowly defined right is extinguished, therefore, a taking will always result. As this Court aptly observed long ago, however, “[g]overnment could hardly go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law,” *Pennsylvania Coal Co. v. Mahon*,

(quoting *Restatement (Second) of Torts* § 821D, cmt. e); *Colwell Sys., Inc. v. Henson*, 452 N.E.2d 889, 892 (Ill. App. Ct. 1983) (same). That possibility, however, only underscores the need for concrete facts to evaluate the *per se* takings claims raised by respondents here.

260 U.S. at 413, and this Court's takings jurisprudence has been a careful effort to avoid the paralysis of overprotection while recognizing the basic right guaranteed by the Fifth Amendment. The Iowa Supreme Court's decision threatens to upset that balance; indeed, under the reasoning of the court below, it is hard to see how common zoning ordinances—long thought to be generally insulated from takings claims, and certainly not the subject of *per se* takings claims—do not work a taking. Cf. *Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980) (enactment of zoning ordinance designed to protect residents “from the ill effects of urbanization” not a taking).<sup>14</sup>

The analysis adopted by the court below is in conflict not only with the framework adopted in decisions of this Court but also with efforts by other courts to apply that framework in similar contexts. In *San Diego Gas & Electric Co. v. Superior Court*, 920 P.2d 669, 698 (Cal. 1996), for example, the California Supreme Court rejected a claim that “an intangible intrusion onto plaintiff’s property” by electric and magnetic fields was a taking without regard to its economic impact. Maryland’s highest court has likewise rejected efforts to expand the category of *per se* takings beyond those recognized by this Court. In *Maryland Port Admin. v. QC Corp.*, 529 A.2d 829 (Md. 1987), that court declined to find a *per se* taking where a business complained about the operation of a landfill on adjoining property, and specifically that “the ambient air over [its] property contains chrome.” *Id.* at 834. Critical to the court’s conclusion was the fact that there was no

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<sup>14</sup> While zoning ordinances generally prohibit certain uses of property and the right to farm law affirmatively protects certain uses, there is no constitutional distinction between the two. As the Court explained in *Lucas*, “the distinction between regulation that ‘prevents harmful use’ and that which ‘confers benefits’ is difficult, if not impossible, to discern on an objective, value-free basis; \* \* \* [and] cannot serve as a touchstone to distinguish regulatory ‘takings’—which require compensation—from regulatory deprivations that do not require compensation.” 505 U.S. at 1026.

physical invasion of the property. *Id.* at 834-838. The Second Circuit in *Southview Assocs.*, *supra*, rejected a claim that a *per se* physical taking occurred when a landowner was denied a permit for a specific proposed development (but not all development) on the ground that the development would adversely affect a nearby deer habitat. 980 F.2d at 92-95. Under the decision of the Iowa Supreme Court below, each of these cases—and countless other similar decisions—might well have come out differently. The existence of such a conflict among the courts is yet another compelling reason for this Court to review the decision below.<sup>15</sup>

### III. THE DECISION BELOW CALLS INTO QUESTION THE CONSTITUTIONALITY OF LAWS EXISTING IN ALL FIFTY STATES AND THREATENS TO UPSET SETTLED TAKINGS JURISPRUDENCE.

The decision of the Iowa Supreme Court plainly warrants review under the standards commonly applied by this Court, for at least three reasons.

*First*, the decision holding the right to farm law unconstitutional is of critical importance because of its widespread effects on similar laws. While even the court below recognized that the decision is important in Iowa itself, *see* App. 26a (“We recognize that political and economic fallout from our holding will be substantial”), the decision necessarily calls into question the right to farm laws that exist in *all fifty States*. *See* App. 72a-73a. One recent commentator has called such laws (along with property tax relief) “by far the most ubiquitous farmland protection program in this country.” Alexander A. Reinart,

<sup>15</sup> The Iowa court’s holding that the right to farm law effects a taking when it withdraws the right to bring a nuisance action is also inconsistent with the settled rule that States are free to create or eliminate causes of action and defenses thereto. *See Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) (citing cases); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-433 (1982).

*The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. Rev. 1694, 1695 (Nov. 1998). These laws are not some recently-revived relic of idyllic, agrarian days gone by. Instead, the vast majority of the Nation's right to farm laws were adopted in the last twenty years. *Id.* at 1707. These laws thus represent the contemporaneous and unanimous judgment of the States that farming is worth preserving and protecting, and that protections—such as those from certain nuisance actions—are appropriately offered to farmers as a means of adjusting the economic burdens on and benefits to landowners in our society.

Although varying in details, the essential and underlying purpose of each State's right to farm law is the same—to give agricultural operations a reasonable and qualified defense to nuisance actions. At bottom, regardless of the exact nature of this defense in each State, all right to farm laws share the common trait of providing protection for activities that might otherwise be determined to be a nuisance. The Court below found that the law created an easement because it “allows the applicants to do acts on their own land which, were it not for the easement, would constitute a nuisance.” App. 13a. This easement, the court ruled, was a taking *per se*. Under this analysis, the right to farm laws in all fifty States constitute *per se* takings and are facially unconstitutional.

The Court has recognized that certiorari is warranted where a decision implicates the laws of many (in this case, all) States. *See, e.g., New York v. Ferber*, 458 U.S. 747, 749 & n.2 (1982) (certiorari granted when state court struck down state statute with counterparts in 19 other States); *New York v. O'Neill*, 359 U.S. 1, 3 (1959) (certiorari granted to review state court decision striking down state statute “inasmuch as this holding brings into question the constitutionality of a statute now in force in forty-two states”). The question presented here is of such gravity that the Court ought to grant the petition.

*Second*, as we have explained, the Iowa Supreme Court “has decided an important federal question in a way that conflicts with relevant decisions of this Court.” S. Ct. Rule 10(c). Over the past two decades, beginning with its seminal decision in *Penn Central*, the Court has devoted substantial effort to articulating and developing takings jurisprudence in the context of the modern regulatory state. An important part of this jurisprudence, of course, is the clarification—in *Lucas* and *Nollan* in particular—that some regulatory actions are of such a nature that no *ad hoc* balancing is necessary. As this case demonstrates, however, unless the *per se* categories are themselves carefully delimited, the incremental advances in takings jurisprudence crafted by the Court could well be jettisoned in favor of categorical rules that over-protect the rights of some property owners—at the expense of others.

The Court has also been concerned that takings challenges be entertained only on the basis of an adequate factual record, and cautioned against adjudicating such claims in the abstract. *See supra* at 9-10. The Iowa Supreme Court has cavalierly ignored these warnings, and has instead permitted the blunt instrument of a facial takings challenge to strike down a law that could in many circumstances have little or no real impact on those who claim their property interests are implicated. In addition to clarifying the *per se* takings doctrine, therefore, this case presents the Court with an opportunity to clarify the limited scope of facial challenges to laws said to work a taking.

Here, as noted, the willingness of the Iowa Supreme Court to expand the categories of *per se* takings beyond those recognized by this Court conflicts with the approach of other courts, and therefore the Court should grant the petition in this case to correct the Iowa Supreme Court’s misguided decision in this important area of federal constitutional law. In any event, takings claims by their

nature present uniquely *ad hoc* and factual disputes—or ought to—and the Court has accordingly not found it necessary to await a direct conflict before undertaking necessary clarification in this difficult area. *See Dolan v. City of Tigard*, 512 U.S. 374, 383 (1994) (certiorari granted because the Oregon Supreme Court had allegedly misapplied *Nollan*); *see also Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 1118 (1995) (“In the past, the confused nature of some of our takings case law and the fact-specific nature of takings claims has led us to grant certiorari in takings cases without the existence of a conflict.”) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari).

*Third*, the reasoning of the Iowa Supreme Court's decision also calls into question a wide variety of other laws and regulatory regimes. The threat posed by the decision below is not limited to farmers in Iowa or around the country; if it were applied to analogous situations, it could threaten other land use regulation, including environmental protection and zoning ordinances. Traditionally, these laws have withstood takings challenges—and certainly *per se* takings challenges—because local governments and state legislatures are afforded wide discretion to adjust the benefits and burdens of economic life for the greater common good. *See, e.g., Developments in the Law—Zoning*, 91 Harv. L. Rev. 1427, 1471 (1978) (“Land use regulation typically is required not because one competing use is inherently noxious, but rather because equally innocent uses inevitably conflict and demand some form of legislative resolution.”). The Iowa Supreme Court's decision will now allow takings challenges to sidestep the protection afforded by the balancing of competing interests; under its decision, any law that can be characterized as creating an easement—without any physical invasion of the property—is unconstitutional without more. This evisceration of the physical invasion standard effectively permits *per se* takings doctrine to engulf takings jurispru-

dence. This Court should grant certiorari and reverse the judgment below to make clear that the range of governmental actions that can be considered *per se* takings is far more limited than the Iowa Supreme Court understood.

Finally, we note that this case is an ideal vehicle for consideration of the question presented. As the Iowa Supreme Court observed, "the facts are not in dispute." App. 5a. The federal constitutional issue was squarely presented to and decided by the Iowa Supreme Court. There is no need to let this important question percolate in the lower courts, visiting upon other States the "fallout" that Iowa will realize from the decision below, or to await a better vehicle for resolving the question. The Court should grant certiorari.

#### CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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## **APPENDICES**



APPENDIX A

SUPREME COURT OF IOWA

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No. 96-2276

CLARENCE BORMANN and CAROLINE BORMANN, Husband  
and Wife; LEONARD MCGUIRE and CECELIA MCGUIRE,  
Husband and Wife,

*Appellants,*

v.

BOARD OF SUPERVISORS IN AND FOR KOSSUTH COUNTY,  
IOWA; and JOE RAHM, AL DUDDING, LAUREL FANTZ,  
JAMES BLACK, and DONALD MCGREGOR, In Their Ca-  
pacities as Members of the Board of Supervisors,

*Appellees,*

GERALD GIRRES, JOAN GIRRES, MIKE GIRRES, NORMA  
JEAN THUL, JERALD THILGES, SHIRLEY THILGES,  
THELMA THILGES, EDWIN THILGES, RALPH REDING,  
LORETTA REDING, BERNARD THILGES, JACOB THILGES,  
JOHN GOECKE, and PATRICIA GOECKE,

*Intervenors-Appellees.*

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Sept. 23, 1998

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LAVORATO, Justice.

In this appeal we are asked to decide whether a statu-  
tory immunity from nuisance suits results in a taking of  
private property for public use without just compensa-  
tion in violation of federal and Iowa constitutional provi-

sions. We think it does. We therefore reverse a district court ruling holding otherwise and remand. In doing so, we need not reach a second constitutional challenge.

#### I. Facts and Proceedings.

The facts are not in dispute. In September 1994, Gerald and Joan Girres applied to the Kossuth County Board of Supervisors for establishment of an "agricultural area" that would include land they owned as well as property owned by Mike Girres, Norma Jean Thul, Gerald Thilges, Shirley Thilges, Thelma Thilges, Edwin Thilges, Ralph Reding, Loretta Reding, Bernard Thilges, Jacob Thilges, John Goecke and Patricia Goecke (applicants). *See* Iowa Code § 352.6 (1993). The real property involved consisted of 960 acres. On November 10, 1994, the Board denied the application, making the following findings and conclusions:

- a. The Board finds that the policy in favor of agricultural land preservation is not furthered by an Agricultural Area designation in this case as there are no present or foreseeable nonagricultural development pressures in the area for which the designation is requested.
- b. The Board also finds that the Agricultural Area designation and the nuisance protections provided therein will have a direct and permanent impact on the existing and long-held private property rights of the adjacent property owners.
- c. Thus, the Board concludes that the policy in favor of agricultural land preservation as set forth in Iowa Code chapter 352 is outweighed by the policy in favor of the preservation of private property rights.
- d. Accordingly, the Board finds that the adoption of the Agricultural Area designation in this case is inconsistent with the purposes of Iowa Code chapter 352.

Two months later, in January 1995, the applicants tried again with more success. The Board approved the agricultural area designation by a 3-2 vote—one of which was based on the “flip [of] a nickel.” In granting the designation, the Board this time found that the application to create the agricultural area designation “complies with Iowa Code section 352.6 and that the adoption of the proposed agricultural area is consistent with the purposes of Chapter 352.”

In April 1995, several neighbors of the new agricultural area filed a writ of certiorari and declaratory judgment action in district court. The defendants were the Board and individual board members Joe Rahm, Al Dudding, Laurel Fantz, James Black, and Donald McGregor (Board).

The plaintiffs, Clarence and Caroline Bormann and Leonard and Cecelia McGuire (neighbors), challenged the Board’s action in a number of respects. The neighbors alleged the Board’s action violated their constitutionally inalienable right to protect property under the Iowa Constitution, deprived them of property without due process or just compensation under both the federal and Iowa Constitutions, denied them due process under the federal and Iowa Constitutions, ran afoul of res judicata principles, and was “arbitrary and capricious.” The applicants intervened.

Based on stipulated facts, memoranda and oral argument, the district court determined that the Board’s action was “arbitrary and capricious.” Apparently, the determination was based on one Board member voting on the basis of a flipped coin. This was the only ground on which the court ruled for the neighbors. The court rejected all of their other arguments.

Later, the neighbors filed an Iowa Rule of Civil Procedure 179(b) motion asking the court to clarify its ruling. Meanwhile, the Board corrected the “arbitrary and capri-

cious" infirmity to its November 1995 vote. The neighbors then sought, and received, a certification of appeal from this court.

## II. Scope of Review.

The neighbors sued at law and titled their petition as one for writ of certiorari and one for declaratory judgment. In the petition for writ of certiorari, the neighbors asked that a writ of certiorari issue because the Board's decision was "in excess of" the Board's "jurisdiction" and was "contrary to law" and "illegal" because the decision "violates the Fifth Amendment to the United States Constitution, and article I, section 18 of the Iowa Constitution" in that the decision "effects a taking of the [neighbors'] private property for a use that is not public." The petition asked that the decision be annulled and decreed to be void.

In the petition for declaratory relief, the neighbors sought a declaration that the Board's decision violates the "Fifth Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, and article I, section 18 of the Iowa Constitution."

Iowa Rule of Civil Procedure 306 authorizes the district court to issue a writ of certiorari "where an inferior tribunal, *board or officer* exercising judicial functions, is alleged to have exceeded its, or his proper jurisdiction or otherwise acted illegally." (Emphasis added.) Our scope of review is limited to sustaining a board's decision or annulling it in whole or in part. *Grant v. Fritz*, 201 N.W. 2d 188, 189 (Iowa 1972). In addition, the fact that the plaintiff has another adequate remedy does not preclude granting the writ. Iowa R. Civ. P. 308.

Thus, here, a petition for a writ of certiorari is appropriate to test the legality of the Board's decision. Our scope of review is limited to sustaining the Board's decision or annulling it in whole or in part. In addition, the fact that the neighbors may have another adequate

remedy, like declaratory judgment, does not preclude our granting relief under Rule 306.

Iowa Rule of Civil Procedure 261 (declaratory judgment) authorizes “[c]ourts of record within their respective jurisdiction [to] declare rights, status, and other legal relations whether or not further relief is or could be claimed.”

The purpose of a declaratory judgment is to determine rights in advance. *Miehls v. City of Independence*, 249 Iowa 1022, 1030, 88 N.W.2d 50, 55 (1958). The essential difference between such an action and the usual action is that no actual wrong need have been committed or loss incurred to sustain declaratory judgment relief. *Id.* at 1031, 88 N.W.2d at 55. But there must be no uncertainty that the loss will occur or that the right asserted will be invaded. *Id.* As with a writ of certiorari, the fact that the plaintiff has another adequate remedy does not preclude declaratory judgment relief where it is appropriate. Iowa R. Civ. P. 261.

We think the facts here are sufficient for us to proceed under either remedy. In addition, because the facts are not in dispute, we need not concern ourselves with whether we employ a correction-of-errors-at-law review or a de novo review. Our only question is a legal one.

### III. The Takings Challenge.

A. The parties’ contentions. The Board’s approval of the agricultural area here triggered the provisions of Iowa Code section 352.11(1)(a). More specifically, the approval gave the applicants immunity from nuisance suits. The neighbors contend that the approval with the attendant nuisance immunity results in a taking of private property without the payment of just compensation in violation of federal and state constitutional provisions.

The neighbors concede, as they must, that their challenge to section 352.11(1)(a) is a facial one because the

neighbors have presented neither allegations nor proof of nuisance. However, the neighbors strenuously argue that in a facial challenge context courts have developed certain bright line tests that spare them from this heavy burden. Specifically, the neighbors say, these bright line tests provide that a governmental action resulting in the condemnation or the imposition of certain specific property interests constitutes automatic or per se takings.

Here, the neighbors argue further, that the section 352.11(1)(a) immunity provision gives the applicants the right to create or maintain a nuisance over the neighbors' property, in effect creating an easement in favor of the applicants. The creation of the easement, the neighbors conclude, results in an automatic or per se taking under a claim of regulatory taking.

The Board and applicants respond that a per se taking occurs only when there has been a permanent physical invasion of the property or the owner has been denied all economically beneficial or productive use of the property. They insist the record reflects neither has occurred. Thus, they contend, the court must apply a balancing test enunciated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). They argue that under that balancing test the neighbors lose.

#### B. The relevant constitutional and statutory provisions.

1. The constitutional provisions. The Fifth Amendment to the Federal Constitution pertinently provides that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment to the Federal Constitution prohibits a state from "depriving any person of life, liberty, or property without due process of law." The Fourteenth Amendment makes the Fifth Amendment applicable to the states and their political subdivisions.

*Chicago B. & Q. R.R. v. City of Chicago*, 166 U.S. 226, 234-35, 17 S.Ct. 581, 584, 41 L.Ed. 979, 983-84 (1897).

Article I, section 9 of the Iowa Constitution pertinently provides that "no person shall be deprived of life, liberty, or property, without due process of law." Article I, section 18 of the Iowa Constitution provides:

Eminent domain—drainage ditches and levees. Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury.

2. The statutory provisions. Iowa Code section 352.6 sets forth the procedure for obtaining an agricultural area designation. The application is to the county board of supervisors. Iowa Code § 352.6. This provision also prescribes the conditions under which a county board of supervisors may designate farmland as an agricultural area. *Id.* An agricultural area includes, among other activities, raising and storing crops, the care and feeding of livestock, the treatment or disposal of wastes resulting from livestock, and the creation of noise, odor, dust, or fumes. Iowa Code § 352.2(6).

Iowa Code section 352.11(1)(a) provides the immunity from nuisance suits:

A farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation. This paragraph shall apply to a farm operation conducted within an agricultural area for six years following the exclusion of land within an agricultural area other than by withdrawal as provided in section 352.9.

The immunity does not apply to a nuisance resulting from a violation of a federal statute, regulation, state

statute, or rule. Iowa Code § 352.11(1)(b). Nor does the immunity apply to a nuisance resulting from the negligent operation of the farm or farm operation. *Id.* Additionally, there is no immunity from suits because of an injury or damage to a person or property caused by the farm or farm operation before the creation of the agricultural area. *Id.* Finally, there is no immunity from suit "for an injury or damage sustained by the person [bringing suit] because of the pollution or change in condition of the waters of a stream, the overflowing of the person's land, or excessive soil erosion into another person's land, unless the injury or damage is caused by an act of God." *Id.*

Iowa Code section 657.1 defines nuisance and provides for civil remedies:

Whatever is injurious to health, indecent, or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to unreasonably interfere with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary proceedings may be brought to enjoin and abate the same and to recover damages sustained on account thereof.

Iowa Code section 657.2 is a laundry list of the conduct or conditions that are deemed to be a nuisance. Those that are relevant to nuisances resulting from farming and farm operations include:

1. The erecting, continuing, or using any building or other place for the exercise of any trade, employment, or manufacture, which, by occasioning noxious exhalations, unreasonably offensive smells, or other annoyances, becomes injurious and dangerous to the health, comfort, or property of individuals or the public.

2. The causing or suffering any offal, filth, or noisome substance to be collected or to remain in any place to the prejudice of others.

...

4. The corrupting or rendering unwholesome or impure the water of any river, stream, or pond, or unlawfully diverting the same from its natural course or state, to the injury or prejudice of others.

Iowa Code § 657.2.

Our cases recognize that the statutory definition of nuisance does not “modify the common-law’s application to nuisances.” *Weinhold v. Wolff*, 555 N.W.2d 454, 459 (Iowa 1996). Rather, the statutory provisions “are skeletal in form, and [we] look to the common law to fill in the gaps.” *Id.*

There are two kinds of nuisances: public and private. We cited the differences between the two in *Guzman v. Des Moines Hotel Partners*:

A public or common nuisance is a species of catchall criminal offenses, consisting of an interference with the rights of a community at large. This may include anything from the obstruction of a highway to a public gaming house or indecent exposures. A private nuisance, on the other hand, is a civil wrong based on a disturbance of rights in land. . . . The essence of a private nuisance is an interference with the use and enjoyment of land. Examples include vibrations, blasting, destruction of crops, flooding, pollution, and disturbance of the comfort of the plaintiff, as by unpleasant odors, smoke, or dust.

489 N.W.2d 7, 10 (Iowa 1992) (citations omitted). We are dealing here with private nuisances.

To fully understand the issues we are about to discuss, we think it would aid our analysis to distinguish between

the concepts of "private nuisance" and "trespass." We made this distinction in *Ryan v. City of Emmetsburg*:

As distinguished from trespass, which is an actionable invasion of interests in the exclusive possession of land, a private nuisance is an actionable invasion of interests in the use and enjoyment of land. Trespass comprehends an actual physical invasion by tangible matter. An invasion which constitutes a nuisance is usually by intangible substances, such as noises or odors.

232 Iowa, 600, 603, 4 N.W.2d 435, 439 (1942).

In *Ryan*, we also distinguished between the concepts of "nuisance" and "negligence." Negligence is a type of liability-forming conduct, for example, a failure to act reasonably to prevent harm. *Id.* In contrast, nuisance is a liability-producing condition. *Id.* Negligence may or may not accompany a nuisance; negligence, however, is not an essential element of nuisance. *Id.* If the condition constituting the nuisance exists, the person responsible for it is liable for resulting damages to others even though the person acted reasonably to prevent or minimize the deleterious effect of the nuisance. *Id.*

C. The framework of analysis. As the neighbors point out, the federal and state constitutional provisions we set out earlier provide the following framework for a "takings" analysis: (1) Is there a constitutionally protected private property interest at stake? (2) Has this private property interest been "taken" by the government for public use? and (3) If the protected property interest has been taken, has just compensation been paid to the owner? The neighbors contend there is a constitutionally protected private right which the Board has taken from them without paying just compensation. That taking, the neighbors contend, results from the Board's approval of the agricultural area triggering the nuisance immunity in section 352.11(1)(a).

The Board and the applicants concede the neighbors have received no compensation so we need not concern ourselves with the third step of the analysis: Has just compensation been paid to the owner?

1. Is there a constitutionally protected private property interest at stake?

- a. Does the immunity provision in section 352.11(1) (a) against nuisance suits create a property right? Textually, the federal and Iowa Constitutions prohibit the government from taking property for public use without just compensation. Property for just compensation purposes means "the group of rights inhering in the citizens' relation to the physical thing, as the right to possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311, 318 (1945). In short, property for just compensation purposes includes "every sort of interest the citizen may possess." *Id.*; see also *Liddick v. Council Bluffs*, 232 Iowa 197, 221-22, 5 N.W.2d 361, 374 (1942) ("[P]roperty is not alone the corporeal thing, but consists also in certain rights therein created and sanctioned by law, of which, with respect to land, the principal ones are the rights of use and enjoyment. . . .").

State law determines what constitutes a property right. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161, 101 S.Ct. 446, 451, 66 L.Ed.2d 358, 362 (1980). Thus, in this case, Iowa law defines what is property.

The property interest at stake here is that of an easement, which is an interest in land. Over one hundred years ago, this court held that the right to maintain a nuisance is an easement. *Churchill v. Burlington Water Co.*, 94 Iowa 89, 93, 62 N.W. 646, 647 (1895). *Churchill* defines an easement as

a privilege without profit, which the owner of one neighboring tenement [has] of another, existing in respect of their several tenements, by which the servient owner is obliged to suffer, or not do something on his own land, for the advantage of the dominant owner.

*Id.*

*Churchill's* holding that the right to maintain a nuisance is an easement and its definition of an easement are consistent with the Restatement of Property:

An easement is an interest in land which entitles the owner of the easement to *use* or enjoy land in the possession of another. . . . It may entitle him to do acts which he would otherwise not be privileged to do, or it may merely entitle him to prevent the owner of the land subject to the easement from doing acts which he would otherwise be privileged to do. An easement which entitles the owner to do acts which, were it not for the easement, he would not be privileged to do, is an affirmative easement. . . . [The easement] may entitle [its] owner to do acts on his own land which, were it not for the easement, would constitute a nuisance.

Restatement of Property § 451 cmt. a, at 2911-12 (1944) (emphasis added).

Another feature of easements is that easements run with the land:

The land which is entitled to the easement or service is called a dominant tenement, and the land which is burdened with the servitude is called the servient tenement. Neither easements [n]or servitudes are personal, but they are accessory to, and run with, the land. The first with the dominant tenement, and the second with the servient tenement.

*Dawson v. McKinnon*, 226 Iowa 756, 767, 285 N.W. 258, 263 (1939).

Thus, the nuisance immunity provision in section 352.11(1)(a) creates an easement in the property affected by the nuisance (the servient tenement) in favor of the applicants' land (the dominant tenement). This is because the immunity allows the applicants to do acts on their own land which, were it not for the easement, would constitute a nuisance. For example, in their farming operations the applicants would be allowed to generate "offensive smells" on their property which without the easement would permit affected property owners to sue the applicants for nuisances. See Iowa Code § 352.2(6); see also *Buchanan v. Simplot Feeders Ltd. Partnership*, 134 Wash.2d 673, 952 P.2d 610, 615 (1998) (holding that Washington's Right-to-Farm Act gives farm quasi easement, against urban developments that subsequently locate next to farm, to continue nuisance activities) (dictum).

b. Is an easement a protected property right subject to the requirements of the just compensation clauses of the federal and Iowa Constitutions? Easements are property interests subject to the just compensation requirements of the Fifth Amendment to the Federal Constitution. *United States v. Welch*, 217 U.S. 333, 339, 30 S.Ct. 527, 527, 54 L.Ed 787, 788 (1910). Easements are also property interests subject to the just compensation requirements of our own Constitution. *Simkins v. City of Davenport*, 232 N.W.2d 561, 566 (Iowa 1975).

c. Has the easement resulted in a taking?

(1) Takings jurisprudence, generally. There are two categories of state action that *must* be compensated without any further inquiry into additional factors, such as the economic impact of the governmental conduct on the landowner or whether the regulation substantially advances a legitimate state interest. The two categories include regu-

lations that (1) involve a permanent physical invasion of the property or (2) deny the owner all economically beneficial or productive use of the land. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). These two categories are what the neighbors term “per se” takings. The per se rule regarding the first category—physical invasion—was firmly established in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 3171, 78 L.Ed.2d 868, 886 (1982).

Presumably, in all other cases involving “regulatory takings” challenges, the United States Supreme Court engages in a case-by-case examination in determining at which point the exercise of the police power becomes a taking. *Id.* This ad hoc approach calls for a balancing test that is essentially one of reasonableness. The test focuses on three factors: (1) the economic impact of the regulation on the claimant’s property; (2) the regulation’s interference with investment-backed expectations; and (3) the character of the governmental action. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631, 648 (1978). According to some commentators, a court must first find that the regulation substantially advances legitimate state interests before the court may test the regulation against the three factors in *Penn Central*. See, e.g., Craig A. Peterson, *Land Use Regulatory “Takings” Revisited: The New Supreme Court Approaches*, 39 *Hastings L.J.* 335, 351 (1988).

(2) Physical invasion. The Board and applicants contend the neighbors’ argument fails under both categories of per se takings: physical invasion and denial of all economically beneficial or productive use of the property. The neighbors do not contend the record supports a finding that the challenged statute denies them all economically beneficial or productive use of their property.

Accordingly, we restrict our discussion to the physical invasion category.

According to one commentator.

[t]he term "regulatory taking" refers to situations in which the government exercises its "police powers" to restrict the use of land or other forms of property. This is often accomplished through implementation of land use planning, zoning and building codes. In contrast, a governmental entity exercises its eminent domain power or acts in an "enterprise capacity, where it takes unto itself private resources and uses them for the common good." Where the private landowner will not sell the land, the government entity seeks condemnation of the property and pays a fair purchase price to be determined in court. On the other hand, an inverse condemnation claim is sought by a landowner when the government fails to seek a condemnation action in court.

John W. Shonkwiler & Terry Morgan, *Land Use Litigation* § 1.02, at 6 (1986) [hereinafter Shonkwiler]. The neighbors' challenge here is one of inverse condemnation.

We think it would aid our analysis of the neighbors' takings argument to discuss those cases where a government entity acting in its enterprise capacity has appropriated private property without first exercising its eminent domain power.

(a) Trespassory invasions of private property by government enterprise. Generally, when the government has physically invaded property in carrying out a public project and has not compensated the landowner, the United States Supreme Court will find that a per se taking has occurred. See *Shonkwiler* § 10.01(a) at 369. For example, in *Pumpelly v. Green Bay & Mississippi Canal Co.*, the Court held there was a taking where the defendant's construction of a dam, pursuant to state authority,

permanently flooded the plaintiff's property. 13 Wall. 166, 80 U.S. 166, 181, 20 L.Ed. 557, 561 (1871). In so holding, the Court enunciated the following rule:

[W]here real estate is actually invaded by super-induced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the constitution. *Id.*

In a more recent case, the Court applied the same rule to a state law that authorized third parties to physically intrude upon private property. *Loretto*, 458 U.S. at 432 n. 9, 102 S.Ct. at 3174 n. 9, 73 L.Ed.2d at 880 n. 9 (holding that a New York statute requiring the owners of apartment buildings to permit cable television operators to install transmission facilities on their property was in violation of the Just Compensation Clause).

(b) Nontrespassory invasions of private property by government enterprise. To constitute a per se taking, the government need not physically invade the surface of the land. See Shonkwiler § 10.02(2), at 370. For example, in *United States v. Causby*, the Court held that the frequent and regular flights of government planes over the plaintiffs' land had created an easement in the lands for the benefit of the government. 328 U.S. 256, 266-67, 66 S.Ct. 1062, 1068, 90 L.Ed. 1206, 1213 (1946). The plaintiffs owned a small chicken farm near an airport leased by the government for use by army and navy aircraft. The glide path of one of the runways passed right over the plaintiffs' land at a height of only eighty-three feet. As a result of the aircraft's noise, the plaintiffs had to abandon their commercial chicken operation. *Id.*

The Court held that the flights' interference with the use of the plaintiffs' land constituted a taking of a flight easement that had to be compensated on the basis of

diminution in the land's value resulting from the easement. *Id.* at 261-62, 66 S.Ct. at 1066, 90 L.Ed. at 1210. In the course of its opinion, the Court stated:

[T]he flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. . . . The reason is that there [is] an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. . . . The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think the landowner, as an incident to his ownership, has a claim to it and invasions of it are in the same category as invasions of the surface. . . . Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case. For the findings of the Court of Claims plainly establish that there was a diminution in value of the property and that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land.

*Id.* at 265-67, 66 S.Ct. at 1067-68, 90 L.Ed. at 1212-13; accord *Griggs v. Allegheny County*, 369 U.S. 84, 89, 82 S.Ct. 531, 533-34, 7 L.Ed.2d 585, 588-89 (1962); see also *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287 (1922) (holding that firing, and imminent threat of firing, of navy coastal guns over plaintiff's property imposed a "servitude" upon the plaintiff's land and thus amounted to a taking of some interest for public use); *Dolezal v. City of Cedar Rapids*, 209 N.W.2d 84, 87 (Iowa 1973) (recognizing a navigation easement as one that permits free flights over land including those so low and so frequent

as to amount to a taking of property); 2A Philip Nichols, *Eminent Domain* § 6.06, at 6-92 (3d rev. ed. 1998) (“Physical invasions of property are not limited to human or even vehicular entry. To the contrary, the majority of cases involve the transmission of smoke, dust, earth, water, sewage or some other agent onto the impacted property. Regardless of the agent, the result of the invasion may be diminution in values of the property, partial or complete (and permanent and temporary) appropriation, or complete destruction.”) [hereinafter Nichols].

In *Fitzgerald v. City of Iowa City*, 492 N.W.2d 659, 663 (Iowa 1992), we had occasion to consider a physical invasion claim involving overflying aircraft. As in *Causby*, the plaintiffs in *Fitzgerald* claimed the overflying aircraft so adversely affected the use and enjoyment of their property that a taking had resulted. We rejected the claim because the plaintiffs had failed to prove a “measurable decrease in market value” due to the overflying aircraft. *Id.* at 665. Nevertheless, we cited *Causby* for the proposition that “[i]n some circumstances, overflying aircraft may amount to a physical invasion.” *Id.* We recognized that when interferences with property from overflying aircraft result in a measurable decrease in property market value, a taking has occurred. *Id.* at 663. In such cases, we said “the right to recovery is not for the nuisance that must be endured but for the loss of value that has resulted.” *Id.* The loss-in-value measure of damages is what we would ordinarily use in eminent domain cases. *Id.* As mentioned, *Causby* used this same measure of damages.

The United States Supreme Court has allowed compensation for other kinds of interferences short of physical taking or touching of land. See William B. Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 Dick. L.Rev. 207, 220-21 (1967) [hereinafter Stoebuck]. For example, in *United States v. Welch*, the plaintiff had a passage easement over a neighbor’s property. 217 U.S. 333, 339, 30 S.Ct. 527, 527,

54 L.Ed. 787, 789-90 (1910). The passage was the plaintiff's only access to a county road. The government flooded the neighbor's property thereby cutting off the plaintiff's only access to the road. The Court held the plaintiff was entitled to compensation for the easement. *Id.* at 339, 30 S.Ct. at 527, 54 L.Ed. at 789-90. Because the benefited land—plaintiff's property—was not physically touched, this case is “a clear example of condemnation without any physical taking.” Stoebuck, at 221; *see Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831, 107 S.Ct. 3141, 3143, 97 L.Ed.2d 677, 687 (1987) (holding that requiring property owner to give easement of access across his property to obtain a building permit was a physical taking of private property that required compensation).

In *Pennsylvania Coal Co. v. Mahon*, a state statute prohibited coal mining if it were done in a manner to cause subsidence of any dwelling. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). The plaintiff had a contract to mine coal under a dwelling but the statute prevented the plaintiff from doing so. *Id.* The Court held the statute was an attempt to condemn property—the right to mine coal—without compensation. *Id.* at 414, 43 S.Ct. at 159-60, 67 L.Ed. at 326. *Mahon* “is a situation in which, by denying an owner the occupancy and use of his property interest, the government takes the interest without any semblance of physical intrusion.” Stoebuck, at 221.

*Richards v. Washington Terminal Co.* presents a factual scenario closer to the facts in this case. 233 U.S. 546, 34 S.Ct. 654, 58 L.Ed. 1088 (1914). In *Richards*, the plaintiff owned residential property along the tracks of a railroad that had the power of eminent domain. The property lay near the mouth of a tunnel. The Court recognized that two kinds of the railroad's activities had partially destroyed the plaintiff's interest in the enjoyment of his property. The first kind involved smoke, dust,

cinders, and vibrations invading the plaintiff's property at all points at which the property abutted the tracks. The second kind involved gases and smoke emitted from engines in the tunnel that contaminated the air and invaded the plaintiff's property. A fanning system inside the tunnel forced the emission of the gases and smoke from the tunnel. As to the first activity, the Court denied compensation because it was the kind of harm normally incident to railroading operations. *Id.* at 554-55, 34 S.Ct. at 657-58, 58 L.Ed. at 1091-92. As to the second activity—gases and smoke from the tunnel—the Court concluded the plaintiff was entitled to compensation for the “special and peculiar damage” resulting in diminution of the value of the plaintiff's property. *Id.* at 557, 34 S.Ct. at 658, 58 L.Ed. at 1093.

*Richards* is viewed as recognizing the taking of a property interest or right “to be free from ‘special and peculiar’ governmental interference with enjoyment.” *Stoebuck*, at 220. The taking involved “no kind of physical taking or touching—none whatever.” *Id.* Viewed in this light, *Richards* “entirely does away with the requirement of a physical taking or touching.” *Id.*; see *Nichols* § 6.01, at 6-9 n. 11 (“It is not necessary, in order to render a statute obnoxious to the restraint of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or thing itself, so long as it affects its free use and enjoyment. . .”).

(c) Liability of government for a taking by the operation of a nuisance-producing governmental enterprise. With regard to private nuisances,

[t]he power of the legislature to control and regulate nuisances is not without restriction, and it must be exercised within constitutional limitations. The power cannot be exercised arbitrarily, or oppressively, or unreasonably. . . . It has been broadly stated, as an additional limitation to the power of the legislature, that . . . the legislature may not authorize

the use of property in such a manner as unreasonably and arbitrarily to infringe on the rights of others, as by the creation of a nuisance. So it has been held that the legislature has no power to authorize the maintenance of a nuisance injurious to private property without due compensation.

66 C.J.S. *Nuisances* § 7, at 738 (1950).

Thus, the state cannot regulate property so as to insulate the users from potential private nuisance claims without providing just compensation to persons injured by the nuisance. The Supreme Court firmly established this principle in *Richards*, holding that “while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking.” *Richards*, 233 U.S. at 553, 34 S.Ct. at 657, 58 L.Ed. at 1091; *see also Pennsylvania R.R. v. Angel*, 41 N.J. Eq. 316, 7 A. 432, 433 (1886) (“[A]n act of the legislature cannot confer upon individuals or private corporations, acting primarily for their own profit, although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners.”).

A number of state courts have decided takings cases on the basis that the government entity operated a nuisance-producing enterprise. *See, e.g., Thornburg v. Port of Portland*, 233 Or. 178, 376 P.2d 100, 106 (1962) (“[A] taking occurs whenever government acts in such a way as substantially to deprive an owner of the useful possession of that which he owns, either by repeated trespasses or by repeated nontrespassory invasions called ‘nuisance.’”). Significantly, a large number of these cases deal with smoke and odors from sewage disposal plants and city dumps. One commentator describes the cases this way:

Typically, a city sewage plant or dump in the vicinity of, but not necessarily directly adjacent to, the plain-

tiff's land has wafted its noxious smoke, odors, dust, or ashes, usually combinations of these, over the plaintiff's land, with the obvious result of lessening its enjoyment. No physical touching is present, nor do the courts try to equate the municipal acts with touchings. [Several states] have allowed eminent domain compensation in cases of this kind. . . . More significant than a court's language is the result it announces, and in this respect all the decisions stand for the proposition that nuisance-type activities are a taking. . . .

Stoebuck, at 226-27; *see also Nichols* § 6.07, at 6-112 to 6-113 ("[G]eneration of offensive odors, gases, smoke . . . may constitute a taking.").

The commentator ascribes a name to the theory of these cases: condemnation by nuisance. Stoebuck, at 226. And the commentator has formulated the theory this way: "governmental activity by an entity having the power of eminent domain, which activity constitutes a nuisance according to the law of torts, is a taking of property for public use, even though such activity may be authorized by legislation." *Id.* at 208-09; *see also City of Georgetown v. Ammerman*, 143 Ky. 209, 136 S.W. 202, 202 (1911) (holding that odors from city dump adjacent to plaintiff's property created a nuisance that was a taking of the property); *Ivester v. City of Winston-Salem*, 215 N.C. 1, 1 S.E.2d 88, 88-90 (1939) (holding as part of fundamental law of North Carolina that odors from disposal plant next to plaintiff's property constituted nuisance and were a taking; North Carolina has no constitutional provision for a "taking"); *Brewster v. City of Forney*, 223 S.W. 175, 178 (Tex. Com.Ct.App.1920) (holding under Texas Constitution that odors from a nearby sewage disposal plant resulted in a taking of plaintiff's property); *Nichols* § 6.07, at 6-112 (stating under broad view of property—right to use, exclude, and dispose—there need not be a physical taking of the property or even dispossession; any substantial interference

with the elemental rights growing out of property ownership is considered a taking).

One court long ago anticipated the so-called condemnation by nuisance theory this way:

Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that it cannot be occupied in comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense.

*Pennsylvania R.R. v. Angel*, 7 A. at 433-34.

Our own definition of a taking is in accord with this concept:

[A] "taking" does not necessarily mean the appropriation of the fee. It may be anything which substantially deprives one of the use and enjoyment of his property or a portion thereof.

*Phelps v. Board of Supervisors of County of Muscatine*, 211 N.W.2d 274, 276 (Iowa 1973) (holding that construction of a bridge and causeway over river in such a manner as to allegedly cause greater flooding on adjacent property than previously was a "taking" within the meaning of the Iowa Constitution).

As mentioned, the Board's approval of the applicants' application for an agricultural area triggered the provisions of section 352.11(1)(a). The approval gave the applicants immunity from nuisance suits. (Significantly, section 352.2(6) allows an agricultural area to include activities such as the creation of noise, odor, dust, or

fumes.) This immunity resulted in the Board's taking of easements in the neighbors' properties for the benefit of the applicants. The easements entitle the applicants to do acts on their property, which, were it not for the easement, would constitute a nuisance. This amounts to a taking of private property for public use without the payment of just compensation in violation of the Fifth Amendment to the Federal Constitution. This also amounts to a taking of private property for public use in violation of article I, section 18 of the Iowa Constitution.

In enacting section 352.11(1)(a), the legislature has exceeded its authority. It has exceeded its authority by authorizing the use of property in such a way as to infringe on the rights of others by allowing the creation of a nuisance without the payment of just compensation. The authorization is in violation of the Fifth Amendment to the Federal Constitution and article I, section 18 of the Iowa Constitution.

The district court erred in concluding otherwise.

D. The remedy. In *Agins v. Tiburon*, the California Supreme Court held that when legislation results in a taking, the landowner's remedy is to seek a declaratory judgment action that the legislation is invalid because it makes no provision for payment of just compensation. 157 Cal. Rptr. 372, 598 P.2d 25, 28 (Cal.1979); see 1 Nichols, *Eminent Domain* § 1.42(1), at 1-157 (3d rev. ed.1997). The court, however, refused for policy reasons to allow the landowner to sue in inverse condemnation for temporary takings damages. Temporary takings damages represent the damages the landowner suffers up to the time the court declares a statute invalid because it violates constitutional provisions for payment of just compensation. This was the holding in *Agins* under both the federal and state just compensation clauses. *Id.*; see 26 Am.Jur.2d *Eminent Domain* § 137 (1996) ("The constitutional requirement of just compensation may not be evaded or

impaired by any form of legislation, and statutes which conflict with the right to just compensation will generally be declared invalid.”).

Later, the United States Supreme Court had occasion to review the California rule in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). The Court held that invalidation of the offending legislation without compensation for the taking is a constitutionally insufficient remedy for a taking under the Federal Just Compensation Clause. In addition to invalidation, the landowner is entitled to takings damages (temporary taking) that occurred before the ultimate invalidation of the challenged legislation. *Id.* at 319-21, 107 S.Ct. 2388-89, 96 L.Ed.2d at 266-68.

Here the neighbors seek no compensation. Rather, they seek only invalidation of that portion of section 352.11(1)(a) that provides immunity against nuisance suits. We therefore need not concern ourselves with damages for any temporary taking. Accordingly, we hold unconstitutional and invalidate that portion of section 352.11(1)(a) that provides for immunity against nuisance suits. We reach this result under the Fifth Amendment to the Federal Constitution and also under article I, section 18 of the Iowa Constitution.

We reverse and remand for an order declaring that portion of Iowa Code section 352.11(1)(a) that provides for immunity against nuisances unconstitutional and without any force or effect.

We reach this holding with a full recognition of the deference we owe to the General Assembly. That branch of government—with some participation by the executive branch—holds the responsibility to sort through the practical realities and, through the political process, reach consensus in highly controversial public decisions. Those deci-

sions demand our sincere respect. The rule is therefore that "[a] challenger must show beyond a reasonable doubt that the statute violates the constitution and must negate every reasonable basis that might support the statute." *Johnston v. Veterans' Plaza Authority*, 535 N.W.2d 131, 132 (Iowa 1995). The rule finding constitutionality in close cases cannot control the present one, however, because, with all respect, this is not a close case. When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few. In short, it appropriates valuable private property interests and awards them to strangers.

The same public that constituted the other branches of state government to make political decisions with an eye on economic consequences expects the court to resolve constitutional challenges on a purely legal basis. We recognize that political and economic fallout from our holding will be substantial. But we are convinced our responsibility is clear because the challenged scheme is plainly—we think flagrantly—unconstitutional.

REVERSED AND REMANDED.

All justices concur except LARSON and ANDREASEN, JJ., who take no part.

APPENDIX B

[Filed Jul. 31, 1996]

IN THE IOWA DISTRICT COURT  
FOR KOSSUTH COUNTY

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CLARENCE BORMANN and CAROLINE BORMANN, Husband  
and Wife; LEONARD MCGUIRE and CECELIA MCGUIRE,  
Husband and Wife,

*Plaintiffs,*

-vs-

THE BOARD OF SUPERVISORS in and for KOSSUTH COUNTY  
IOWA, and JOE RAHM, AL DUDDING, LAUREL FANTZ,  
JAMES BLACK and DONALD MCGREGOR, In Their Ca-  
pacities as Members of the Board of Supervisors,  
*Defendants.*

GERALD GIRRES, JOAN GIRRES, MIKE GIRRES, NORMAN  
JEAN THUL, GERALD THILGES, SHIRLEY THILGES,  
THELMA THILGES, EDWIN REDING, RALPH REDING,  
LORETTA REDING, BERNARD THILGES, JACOB THILGES,  
JOHN GOECKE and PATRICIA GOECKE,

*Intervenors.*

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FINDINGS, CONCLUSIONS AND JUDGMENT

On the 1st day of April, 1996, the above-captioned proceeding came to the Court's attention pursuant to prior Order. The Plaintiffs appeared by counsel of record, Michael Gabor, the Defendants appeared by counsel of record, David Skilling, Kossuth County Attorney, and the intervenors appeared by counsel of record, Eldon McAfee. The Plaintiffs and Defendants had previously executed and filed a written Stipulation of Facts, and the Defendants had previously made their return of the Writ of

Certiorari, which return and its attachments constitute the record herein. Accordingly, no evidence was received, and this matter was deemed submitted upon the record oral arguments of counsel. The Court has now had an opportunity to examine the factual stipulation, the documents returned with the writ, has had the benefit of the briefs and arguments of the parties, has conducted its own research, and deems itself fully advised and makes the following Findings of Fact, Conclusions and enters the following Judgment.

#### *STATEMENT OF THE CASE*

This case is pled in two counts. Count I is a certiorari proceeding and Count II seeks a corresponding declaratory judgment. The Plaintiffs contend and the Defendants and Intervenor deny that the Defendant, Kossuth County Board of Supervisors, acted illegally in approving, on March 30, 1995, the establishment of an "agricultural area" for certain real property owned by the Intervenor in Riverdale Township, Kossuth County, Iowa. Facts necessary to understand the issues before the Court will be stated next below.

#### *FACTS*

The parties' stipulated statement of fact filed August 22, 1995 is herein incorporated by this reference and will not be repeated. For present purposes it is enough to note that in September, 1994 Gerald and Joan Girres made application for the establishment of an agricultural area in Riverdale Township which included land owned by them and by Mike Girres, Joan Thul, Norman Thul, Gerald Thilges and Shirley Thilges, Thelma Thilges and Edwin Thilges, Ralph Reding and Loretta Reding, Bernard Thilges, Jacob Thilges, John Goecke and Patricia Goecke. The real property involved consisted of 960 acres in Sections 17, 20, 21 and 22 in the said township. Following proper published notice, a hearing was had

before the Defendant Board on November 10, 1994 at which the Board denied the application, finding there were no present or foreseeable non-agricultural development pressures in the area, that the nuisance protections provided by the agricultural area designation would have a direct and permanent impact on the existing and long-held property rights of adjacent property owners and that the policy in favor of agricultural land preservation was outweighed by the policy in favor of the preservation of private property rights.

Thereafter on January 30, 1995, a modified proposal was placed before the board, and on March 14, 1995 was again heard, after proper notice, by the defendant board. On March 30, 1995, in regular session, the defendant board on a 3 to 2 affirmative vote, approved the agricultural area designation.

The transcript of the March 30, 1995 meeting discloses that Supervisor Fantz cast an affirmative vote because: "Um, I guess I feel that the agricultural area law, I really don't like it but it doesn't look like the legislators are going to be doing anything with the law this session. And so for now, I believe that if any of the applicants have followed all the rules and regulations and requirements that an ag area should be granted and I would like to give an example. If a 16 year old goes in to get a driver's license you may not think that he is going to be a responsible driver or you may not like the law, you might think that 16 year olds shouldn't even be allowed to drive, but that 16 year old if they have complied with all the regulations, you would give him a license. And I feel that these people have fulfilled all the legal requirements so therefore I guess I would move that the agricultural area be granted."

The same transcript discloses that Supervisor Dudding cast an affirmative vote because "my decision is based upon the fact that I have had a lot of time to pick up pros and cons on this thing and would you believe the pros and

cons were tied so I flipped a nickel this morning and that is the way I came up with the answers.”

Thereafter, a resolution of the Board approving the agricultural area was, as required by statute, recorded in the office of the Kossuth County Recorder.

On April 11, 1995, the Plaintiffs filed their petition for writ of certiorari and for declaratory judgment, challenging the validity of the State statute authorizing creation of the agricultural area, on certain constitutional and common law grounds to be discussed later, seeking a judgment of this Court declaring the board's approval void.

#### CONCLUSIONS OF LAW INTRODUCTION

At least since the 1970's increasing public concern has arisen that "America is losing its farm land." Note, *Chapter 93A Right-To-Farm-Protection-For-Iowa*, 35 Drake Law Review, 633 (1985-86). Both State and local governments have adopted a variety of protective measures to minimize the conversion of agricultural land to non-agricultural uses. *Id.* at 634. A legislative response to this perceived problem in Iowa was the Iowa Land Preservation and Use Act. Chapter 93A, Code of Iowa (1985), is now Chapter 352, Code of Iowa (1995). The act as originally adopted provided only for a state land preservation policy. Agricultural areas were not mentioned. 1977 Iowa Acts, 67th General Assembly, Chapter 53, approved June 30, 1977. The act provided for a period of study at both the State and County level, and appears to have resulted in the original version of the present statute. As enacted, two distinct themes are present in this chapter. One is the development and implementation in each county of a land preservation plan and the other is the creation of agricultural areas, defined in Section 3(1) of the act, which regulates land uses within such areas, and provides certain protections as will be noted below. 1982

Iowa Acts, 69th General Assembly, Chapter 1245, approved May 14, 1982.

The legislative findings supporting the latter enactment are expressed in Section 2 of the act, (now Section 352.1, Code of Iowa (1995)). It is recited to be the intent of the General Assembly to provide for the orderly use and development of land and related natural resources in Iowa. The section also recognizes the prominence of agriculture as a major economic activity in Iowa and states that establishment of agricultural areas is so that land inside these areas may be conserved for the production of food, fiber and livestock, "thus assuring the preservation of agriculture as a major factor in the economy of this State."

A prominent legal commentator on agricultural law issues has written:

The tension between livestock production in the U.S. and the advocacy of land use controls, environmental regulations, and nuisance laws has grown in recent years. While new research developments may some day help reduce environmental concerns, several factors may make the issue even more significant in the near future. (Research example omitted.)

Changes under way in the structure of the livestock industry increase the potential for conflict between agriculture and non-farmland uses. Increased public awareness and attention to environmental concerns will place new demands on agriculture to insure animal wastes do not pollute air or water. Local governments are being urged to use land use ordinances to control the location of new livestock facilities. As more non-farm people move into rural areas, the potential for nuisance suits over the effects of farming practices will increase. Neal D. Hamilton, *Nuisance, Land Use Control and Environmental Law*, at 405 (Drake University Agricultural Law Center, 1992).

Justice Schultz has previously stated the precise issue more succinctly: "In this appeal we learn that the utopia of country living can be frustrated by modern farming practices." *Valasek v. Bayer*, 401 NW(2) 33 (Iowa 1987).

In this case, the specific portion of Chapter 352 which is drawn into question is Section 352.11 which provides "incentives for agricultural land preservation-payment of costs and fees in nuisance actions", in the following language:

"1. Nuisance restriction. (a) A farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activity of the farm or farm operation. This paragraph shall apply to a farm operation conducted within an agricultural area for six years following the exclusion of land within an agricultural area other than by withdrawal as provided in Section 352.9."

Subsequent subsections provide that the foregoing blanket protection is inapplicable if the nuisance results from an operation conducted in violation of a Federal or State statute or rule, or from "negligent" operation of the farm or farm operation. Subsequent legislation has further provided that a nuisance suit may not be brought until a mediation release is secured under Chapter 654B, and that if a defendant is a prevailing party, the defendant may be awarded attorney fees and costs if the court determines the plaintiff's claim was "frivolous". 1993 Iowa Acts, 75th General Assembly, Chapter 1246, approved May 20, 1993.

The foregoing statutory provision has substantially, although not completely, abrogated one's right to bring a common law nuisance action seeking damages or injunctive relief to abate conditions occurring upon a farm located within a designated agricultural area. The legis-

lative findings and statutory history amply demonstrate a strong and compelling public interest in preserving both agricultural land in general and the quality of the State's agricultural economy in particular. The question before the Court is whether the means adopted by the legislature to so do are consistent with the constitution. Additional claims made by the Plaintiffs are that the Defendant Board acted illegally in adopting the resolution approving the ag area in question here. The specific constitutional claims of the Plaintiffs are:

1. That the statute is violative of Article I, Section I of the Iowa Constitution because it abrogates a common law right to maintain a private nuisance action.
2. That the statute constitutes a "taking" for a non-public use, that is to say, for the benefit of the private farmland owners within the agricultural area.
3. That the statute operates as an exercise of eminent domain without just compensation.
4. That the statute operates as a regulatory taking without just compensation.
5. That the statute operates as a deprivation of property without procedural due process.

The Plaintiffs further claim that there was error or infirmity in the Board action of March 30, 1995, approving the ag area designation, in that: (1) The March approval is barred by the November, 1994 decision to disapprove a substantially similar agricultural area as *res judicata*. (2) The opinion was arbitrary and capricious and therefore illegal. (3) The approval was effected by a legal error, that is, at least one board member believed (contrary to law) that the Board had no discretion to disapprove (and was therefore compelled to approve) the proposed ag area designation.

Each of these contentions will be addressed in turn below.

Before proceeding to address the contentions of the parties, it is appropriate to note that the Plaintiffs' cause of action is stated in two counts. Count one is a certiorari proceeding alleging the constitutional and statutory infirmities noted above, and count two is a declaratory judgment act seeking the same relief. Where violations of basic constitutional safeguards are involved, it is the duty of the Court to make its own evaluation of the facts from the totality of the circumstances. *Hancock v. City Council of Davenport*, 392 NW(2) 472 (Iowa 1986). Illegality of the board's proceedings would be established if the board has acted in violation of a constitutional provision or has not acted in accordance with law. *Id.* The fact that the Plaintiffs have chosen both certiorari and a declaratory judgment proceeding do not change the standard of review nor convert it to an equitable proceeding. The role of this Court is limited to determining whether the inferior tribunal, board or officer, exceeded its proper jurisdiction or otherwise acted illegally. If it is found that the statute implemented by the Board in this case is unconstitutional then illegality will be established.

#### STANDARD OF REVIEW

It is also worthy of note that the Plaintiffs are making a facial challenge to Section 352.11. It is not alleged that any of the Intervenor are at this time maintaining a nuisance upon their premises, and under these circumstances, the Plaintiffs have assumed a particularly heavy burden. In a similar circumstance the U.S. Supreme Court has said:

Because appellee's taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning whether application of the Act to particular surface mining operations or its effect upon specific parcels of land. Thus, the only issue properly before the district court and, in turn, this court, is whether the "mere enactment" of the

Surface Mining Act constitutes a taking. (citation omitted). The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land. . . ." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 69 L.Ed.2d 1, 101 S.Ct. 2352 (1981).

Plaintiffs in such a position have been said to face "an uphill battle." *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161 (9th Cir. 1993).

The standard for showing that a zoning restriction is facially invalid is "very high." *Carpenter v. Tahoe Regional Planning Agency*, 804 F.Supp. 1316 (D. Nev. 1992).

The most frequently cited case for the foregoing propositions is *Agin v. City of Tiburon*, 447 U.S. 255, 65 L.Ed.2d 106, S.Ct. 2138 (1980), where the court said: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." 447 U.S. at 260.

The statute challenged in this case, as noted above, substantially restricts the rights of adjoining land owners to prosecute a cause of action for the maintenance of a private nuisance against persons operating a farm within the defined agricultural area. It is worthy first to examine the nature of a nuisance cause of action in order to fully understand what the Plaintiffs claim to have been abrogated.

Although Chapter 657 statutorily defines nuisances to include "whatever is . . . offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary

proceedings may be brought to enjoin and abate the same and to recover damages sustained on account thereof." These statutory definitions do not modify the common law rule applicable to nuisances. "Another well established rule is that one must use his own property so that his neighbor's comfortable and reasonable use and enjoyment of his estate will not be unreasonably interfered with or disturbed. *Schlotefelt v. Vinton Farmers' Supply Co.*, 252 Iowa 1102, 1107-08, 109 NW2d 695 (1961). The essential test is said to be the "reasonableness of conducting it (the operation involved) in the manner, at the place and under the circumstances in question." *Ritter v. Keokuk Electro-Metals Co.*, 248 Iowa 710, 82 NW2d 151 (1957).

Our Supreme Court has recognized a distinction between a trespass and a private nuisance. "Trespass comprehends an actual physical invasion by tangible matter. An invasion which constitutes a nuisance is usually by intangible substances, such as noises or odors. It usually involves the idea of continuance or recurrence over a considerable period of time. The line of demarcation between private nuisance and trespass is not always clear. Under certain circumstances, such as in some cases involving the flooding of land, there may be both a trespass and a nuisance. In some instances trespasses of continuing character have been dealt with as nuisances." *Ryan v. City of Emmetsburg*, 232 Iowa 600, 4 NW2d 435 (1942).

To be distinguished are the concepts of nuisances and negligence. Negligence is a type of liability-forming conduct. A private nuisance is a tort. It is a substantial and unreasonable interference with the interest of a private person in the use and enjoyment of his land. It has been called a type of harm. Although negligence may accompany the creating of a nuisance, many invasions are intentional, and continuing conduct resulting in continuing or recurrent invasions, after the actor knows the invasions are resulting, is always intentional. Many authorities hold that any unreasonable or unlawful use of property which

unreasonably interferes with the lawful use and enjoyment of other property is an actionable nuisance; that negligence is not an essential or material element of such an action, and that the actor is, as a rule, liable for the resulting injury to others, notwithstanding his exercise of skill and care to avoid such injury. A nuisance may be found to exist even though the person so accused has used the "highest possible degree of care to prevent or minimize the deleterious effects." *Bowman v. Humphrey*, 132 Iowa 234, 109 NW 714 (1906).

By substantially restricting the rights of the Plaintiffs to in the future maintain an action alleging a private nuisance against the farm operators within the approved ag area, the legislature has therefore diminished the Plaintiffs' ability to protect their own interest in the reasonable and peaceable enjoyment of their own real property. It is to be noted, however, that the abrogation is not complete. The protection accorded the Intervenor is available to them unless: (1) A nuisance results from a farm operation determined to be in violation of a Federal statute or State statute or rule; (2) It results from the negligent operation of the farm or farm operation; (3) From an action or proceeding arising from injury or damage to a person or property caused by the farm or farm operation before the creation of the agricultural area; or (4) From a right to recover damages because of the pollution or changing condition of the water of a stream, the overflowing of a person's land, or excessive soil erosion onto another person's land, unless caused by an act of God.

With the foregoing in mind, the Court will now turn to the specific allegations of the Plaintiffs.

#### IOWA CONSTITUTION, ARTICLE I, SECTION I

The Iowa Constitution, Article I, Section I, provides:

All men are, by nature, free and equal, and have certain inalienable rights—among which are those of

enjoying and defending life and liberty, requiring, possessing and protecting property, and pursuing and obtaining safety and happiness.

The Plaintiffs' position, simply stated, is that, without resort to self-help, the remedy, constitutionally provided, and by the common law, to "protect property" is the maintenance of a common law nuisance action, and that the impairment of that right by the legislature is unconstitutional in violation of the quoted section of the Iowa Constitution.

The stated constitutional provision has been before the Iowa Supreme Court in two principal cases cited by the Plaintiffs in support of their proposition.

The first is *State v. Ward*, 170 Iowa 185, 152 NW 501 (1915), where, in an apparent test case, the Defendant Ward shot and killed a deer contrary to statute. The deer was shot while engaged in the consumption of livestock fodder owned by the defendant. He insisted that although the deer was killed contrary to statute, he was entitled to slay the deer in order to protect his property, and the Iowa Supreme Court agreed. Citing Article I, Section I of the Iowa Constitution, the court said: "By way of analogy, we may note that the plea of reasonable self-defense may always be interposed in justification of the killing of a human being. We see no fair reason for holding that the same plea may not be interposed in justification of the killing of a goat or a deer." Accordingly, although the relevant statute prohibiting the killing of deer contained no exception applicable to the defendant, the court by construction found such a right to exist.

Article I, Section I was also before the Court in *May's Drug Stores v. State Tax Commission*, 242 Iowa 319, 45 NW2d 245 (1951). At the time, an Iowa statute made it unlawful to sell cigarettes at less than cost. The plaintiffs contended that among the rights possessed by an owner of property, such as cigarettes, was the right to sell

them at any price the owner might deem best. Rejecting this argument, the court said:

"It is asserted . . . (the statute) . . . violates Section I, Article I of the State constitution which preserves to all men the "inalienable" right of "possessing and protecting property." The argument is that right of the owner to sell property at any price he sees fit is a valuable property right—one that is inherent in property ownership—and the above constitutional provision preserved this right to plaintiff and the act in question seeks to take it away. . . . The property rights preserved by the above constitutional provisions are subject to the higher and greater right known as the public welfare. The property right which is secured by this section of the constitution is the pre-existing common law right, and both this section and the due process clause . . . exclude arbitrary restrictions on property rights."

In *May*, the Supreme Court found the *act* to be constitutional, finding the stated public purpose, the preservation of small independent retailers, was a sufficient public purpose to sustain the act.

The court added: "The police power is an incident of title to private property, and it is no objection to its reasonable exercise if private property is impaired in value or otherwise adversely affected."

Among the secondary authorities cited by the Plaintiffs for the proposition that a common law right to maintain a private nuisance action is part and parcel of the language of Article I, Section I, is a law review article, *Kempkes, the Natural Rights Clause of the Iowa Constitution: When The Law Sits Too Tight*, 42 Drake L. Rev. 593 (1993). The author traces the history of Article I, Section I of the Iowa Constitution, proposes it as a source of individual constitutional rights, independent of other portions of the State and Federal Constitutions, to protect individual rights from "unwarranted governmental inter-

ference." At footnote 21, at page 599, the author concedes: "This Article does not address issues arising out of legislation affecting an individual's economic or property rights, a broad area in which courts have traditionally accorded legislatures wide latitude for experimenting to promote the public welfare." While the Court has read the quoted Article with much interest, given the author's own disclaimer, the Court concludes that any expansive reading to be accorded the same, will have to await action by our highest court.

In summary upon this point, the Court concludes that the challenged legislation does not infringe Article I, Section I of the Iowa Constitution.

#### TAKING FOR PRIVATE USE

The Plaintiffs contend that the challenged legislation affects a taking of their private property solely for the benefit of adjoining land owners in an agricultural area, and not for any purported public use. As such their argument is grounded in the Fifth Amendment to the Federal Constitution and Article I, Section 18 of the Iowa Constitution. The most widely cited Iowa Supreme Court opinion on this topic is *Simpson v. Low-Rent Housing Agency of Mount Ayr*, 224 NW2d 624 (Iowa 1974). The Court there set out certain principles which will now be repeated:

1. The power of eminent domain cannot be utilized for the purpose of taking private property from one person for the private use of another.
2. The power of eminent domain can be exercised only for a public use or purpose.
3. The foregoing propositions are implied from the language of Article I, Section 18 of the Iowa Constitution which provides: "Private property shall not be taken for public use without just compensation."

4. It is for the legislature to initially determine whether condemnation of private property is for a public use.

5. Where the General Assembly declares a use to be public in nature, there exists an attendant presumption of constitutionality with which the judiciary will not interfere unless the purpose is clearly, plainly and manifestly of a private character. Every reasonable intentment must be indulged in favor of a statutory enactment.

6. It is for the courts, however, to ultimately determine whether a taking by eminent domain is for a public purpose when constitutionality of the foundational statute is challenged. The court is not required to treat a legislative declaration of purpose as final, binding or conclusive.

The specific holding in *Simpson* was that statutory authorization for public authorities to condemn private land, and then convey it to a private non-profit corporation to develop subsidized rental apartments was for a public use.

A statutory scheme was adopted in Hawaii in order to end a land oligopoly pursuant to which a public agency would condemn privately held land, and then under the statutory procedure re-sell the land to the private tenants in possession thereof. A challenge to this scheme was mounted under the 5th Amendment to the U.S. Constitution, alleging that the purpose was wholly private: to take land from owner A and convey it to owner B. The 9th Circuit Court of Appeals agreed, but a unanimous U.S. Supreme Court reversed. The court held that the breaking up of this extreme concentration of private land ownership, which had resulted in a gross distortion of market prices in Hawaii, was within the province of the legislature to accomplish and was not a taking for a private use. The court said: "There is of course a role for courts to

play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the court in *Berman* made clear that it is a frequently "narrow one." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 81 L.Ed.2d 186, 104 S.Ct. 2321 (1984).

Deference to the legislature's public use determination is required until it is shown to involve an impossibility. *Id.* The court added: "But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the court has never held a compensated taking to be proscribed by the public use clause." The court expressly rejected the proposition that the government must possess and use property at some point during the taking. The mere fact that property was taken by eminent domain and later transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. It is not essential that the entire community, nor even any considerable portion, directly enjoy or participate in any improvement in order for it to constitute a public use. Finally, State legislation like that of Congress, is entitled to judicial deference.

In this case, the gist of the Plaintiffs' argument is that a burden is placed upon the Plaintiffs as neighbors to an ag area which burden is not visited upon the entire community. As such, they say that their property rights (i.e. the maintenance of a private nuisance action) is infringed not for any public benefit but for the private benefit for the land owner within the ag area. However, under the standards enunciated above, the legislature's judgment (that the greater good of all Iowans is served by a robust agricultural economy, and that a certain "freedom to farm" is required in order to foster this goal) is rationally related to a proper public purpose, although private land owners are incidentally benefited by the procedure. The Plaintiffs' argument to the contrary must fail.

TAKING WITHOUT JUST COMPENSATION  
A. PHYSICAL INVASION

As noted above, the state and federal constitutions prohibit the taking of private property for public use without just compensation. The first question is whether a "taking" has occurred, and one method of government "taking" which requires just compensation is a physical invasion of the property of another. Where less than a complete taking is involved, the Court's analysis under the first prong of its takings law is whether the property owner has been required to suffer some physical invasion.

Illustrative of takings cases in which a physical invasion is involved is *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982). In *Loretto* a New York statute required a landlord to permit, with one dollar of compensation, the invasion of the landlord's apartment building in order to permit cable television installation for the benefit of the tenants. As it applied to the plaintiff, the landlord was required to permit installation of cable of about one-half inch diameter for approximately 30 feet in length along the top of its building, which invasion would certainly seem to be slight at best. The Supreme Court held, however, that the actual physical invasion by installation of the wires and small connecting boxes, was an actual physical invasion which required just compensation under the 5th Amendment. The court said: "When faced with a constitutional challenge to a permanent physical occupation of real property, this court has invariably found a taking." In its analysis, the U.S. Supreme Court reasoned from "flooding" cases where government action inundated a land owner's property with water. The court noted a clear distinction was drawn between permanent physical occupation, in cases involving a more temporary invasion or government action causing consequential damage within the property of another based on government activity occur-

ring outside the property. The court noted that it has always found a taking only in the case of the permanent invasion.

Applying this analysis to the facts at hand, it is first noted that *Ryan v. City of Emmetsburg*, supra, draws a distinction between physical invasion, characterized as a trespass in *Ryan*, and nuisance which is intangible invasion. In this case, the intangible invasion does not rise to the level of an actual physical occupation such as to constitute a taking. Finding no invasion and therefore no taking, the Court will next turn to the second prong of Supreme Court takings cases.

#### B. REGULATORY TAKING

Although no physical invasion is involved, the Supreme Court has recognized that a taking may occur where regulations are so comprehensive and burdensome as to deprive a private land owner of all economically viable use of property. The Supreme Court recognizes that if the government prohibits all beneficial economic activity upon a parcel of real estate, even though the government does not invade the same, or physically oust the owner from the property, a taking has occurred. In *Nolan v. California Coastal Commission*, 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141 (1987), the Supreme Court held that a California scheme which conditioned a building permit to construct a permanent home on a certain stretch of California beach front upon the owner granting a public easement for use of the beach in front of the property was unconstitutional. Justice Scalia found no connection between the purported purpose of the requirement, to increase access to the sea, to the requirement of the giving of the easement. On the contrary, the Supreme Court found it was actually an authorized physical invasion rather than an appropriate government regulation. While noting that land use regulation does not affect a taking if it "substantially advances

legitimate state interests” and does not “deny an owner economically viable use of his land” if there is no such connection, the taking has occurred which must be compensated. In *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 96 L.Ed.2d 250, 107 S.Ct. 2378 (1987), the U.S. Supreme Court held that an emergency order entered which prohibited the plaintiff church from operating a campground near a river subject to flooding was a “temporary” taking which required compensation.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L.Ed.2d 798, 112 S.Ct. 2886 (1992), a South Carolina statutory plan authorized creation of a beach front management area which required property owned by the plaintiff to be left free of any permanent structure. As in the above cases, the government made no physical invasion of the plaintiff’s property but it was found the regulations had the effect of destroying all reasonable economic benefit to be gained from the property. The court summarized its holdings: “We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”

Under the teaching of the cases described above, it is quite clear that the statutory procedure alleged in this case which, it may be assumed, may require the Plaintiffs to suffer what they say will be odors generated by farming activities in the agricultural area, assuming lack of negligence and affirmative compliance with State and Federal regulations, is not such as to totally deprive the Plaintiffs of all economically advantageous use of their properties. It is conceivable that a situation could be imagined which might approach such a result, but where the challenge to the statute is upon its face and not as applied in a concrete set of facts, this Court has no difficulty in deter-

mining that a regulatory taking has not occurred. The Supreme Court has been markedly disinclined to find a regulatory taking where only one or two sticks in the "bundle of rights" that are part and parcel of the ownership of real property have been impaired, no regulatory taking has occurred. Thus, in *Yee v. City of Escondido*, 503 U.S. 519, 118 L.Ed.2d 153, 112 S.Ct. 1522 (1992), the Supreme Court approved, over a takings challenge, a California statutory provision which authorized the City of Escondido to regulate rentals in mobile home parks.

In this case, the challenged legislation impairs but does not eliminate one of the many "sticks" in the bundle of rights, and as in *Yee v. Escondido*, above, represents the legislature's judgment in adjusting property rights, but does not amount to a taking. The Plaintiffs' claim to the contrary fails.

#### PROCEDURAL DUE PROCESS

The plaintiffs contend that they were deprived of procedural due process in the course of the process outlined in the Statement of Facts above. As appears below, the Court has determined that in approving the agricultural area designation, the board of supervisors was acting in a legislative capacity. This finding compels the conclusion that due process was served by the statutorily required comment-argument type hearing which was conducted in this case. *Montgomery v. Bremer County Board of Supervisors*, 299 N.W.2d 687 (Iowa 1980).

#### NUISANCE VERSUS FIFTH AMENDMENT TAKING

The foregoing discussion amply demonstrates that the partial statutory abrogation of an adjoining landowner's right to bring a common law nuisance suit against a farmer operating within an ag area does not by any means fit neatly within traditional, well-defined methods of analysis for Fifth Amendment takings. Indeed the Court has

determined that none directly apply. As appears below, it is said to be the majority rule that the legislature cannot authorize the maintenance of a nuisance without compensation. The Court will below examine authorities so saying in some detail.

58 Am Jur2d *Nuisances* Section 462 *et. seq.* (1989), discusses the extent to which legislative authorization may constitute a defense in a suit alleging the maintenance of a private nuisance. Section 463 provides in part:

The legislature, generally, may legalize, insofar as the public is concerned, what would otherwise be a public nuisance, and, according to some courts, may legalize what would otherwise be private nuisances, so as to prevent the recovery of damages or relief by way of injunction on account of them, although the weight of authority is to the contrary.

Section 464 elaborates on the foregoing and provides:

The state has power to legalize, insofar as the public is concerned, what would otherwise be a public nuisance, and within constitutional limitations it may make lawful things that were nuisances, even though, by doing so, the use or value of the property is affected.

Section 465, while acknowledging a minority rule to the contrary, says:

According to the weight of authority, however, what is authorized by law may be a private nuisance, and the legislative authorization in this regard does not affect any claim of a private citizen for damages for any special inconvenience and discomfort caused by the authorized act not experienced by the public at large, or for an injunction.

Furthermore, under constitutional provisions against the taking of damaging of private property without compensation, the legislature cannot authorize the

maintenance of a nuisance without compensation to individuals whose property is destroyed or injured thereby, and legislative authority will not exempt the person to whom it is granted from liability for such compensation.

Section 466 provides generally that where statutory exemption or immunity from maintenance of a nuisance cause of action is granted, the granting of immunity is strictly construed. Further, it is not presumed the legislature intended to authorize the creation of the nuisance, unless the offensive conduct is the natural and necessary result of an exercise of the power conferred. Section 467 elaborates on the foregoing and says that the granting of government permits, including zoning permits, will not be construed as an authorization for the creation of a nuisance, nor immunize the same. Section 469 is essentially the safe affect.

26 Am Jur2d *Eminent Domain* Section 145 (1996), provides in part:

Thus, property is taken by the government in the sense of the provision of the Fifth Amendment . . . when inroads are made upon an owner's use of it to an extent that as between private parties, a servitude has been acquired either by agreement or in course of time.

Later:

Thus, a taking of property for which compensation must be paid may not require an actual physical taking or appropriation of the fee simple, but may consist of an interference with the rights of ownership, use, and enjoyment, or any other rights incident to property.

Among the authorities cited for the latter proposition is *Hunziker v. State*, 519 NW2d 367 (Iowa 1994).

Iowa law appears to conform to much of the foregoing. In *State v. Moffett*, 1 Iowa (Greene) 247 (1848), the defendant and others were indicted for damaging a mill dam. The defense was that the existence of the dam caused ponding of water which injured the defendant's own water wheel, that the dam thus created a nuisance, which the defendant had a common law right to abate. The statute under which the defendants were charged made it illegal to injure a mill dam, and the prosecution claimed that the criminal statute abrogated the defendant's common law right to abate the nuisance. The Supreme Court concluded:

There is nothing in our statute, express or implied, excluding remedies which existed before the statute was passed. One of these remedies was abatement of a nuisance; and in the absence of a statute taking this remedy away, it remained preserved. (emphasis supplied).

It thus appears that the court in *Moffett* was merely holding that the criminal statute did not abrogate the right to abate the nuisance, its holding being qualified that "in the absence of a statute taking this remedy away" the remedy remained.

In *Miller v. City of Webster City*, 94 Iowa 162 (1895), the plaintiff sought abatement of a city market created by the city pursuant to statute, where livestock was brought to be weighed and traded. The market area was across the street from the plaintiff's residence. He complained of the odor, noise, dust and the like generated by the animals so confined. The Supreme Court noted that the market was placed under the authority of statute, and said:

Being so authorized they are not public nuisances; for the rule, as we understand it, is where a municipal corporation is authorized to do a particular thing, so long as it keeps within the scope of the power

granted, it is protected from proceedings on behalf of the public, subject possibly to this qualification that the nuisance, if any, arises as a natural and probable result of the act authorized, so that it may fairly be said to be covered, in legal contemplation, by the legislation conferring the power. If the nuisance is not the necessary result of the act authorized, or if it might be exercised in such a manner as to obviate the nuisance, legislative authority will not be inferred from the grant, to create the nuisance, and it will not bar proceedings to abate it.

In *Payne v. Town of Wayland*, 131 Iowa 659 (1906), the plaintiff sought to enjoin the city from using certain property as a cemetery. The court discussed the fact that the city was authorized by statute to establish and maintain a cemetery, and said:

We need not now discuss the power of the legislature to itself create, or to authorize another to create, a private nuisance without compensation to the injured party; for it is evident that no such power is conferred by our statute.

The Iowa Supreme Court appears not yet to have answered the question left open in the *Payne* decision.

The foregoing demonstrates, however, that our State appears to be in the mainstream as described in the American Jurisprudence citations noted above.

In *Baltimore and Potomac R.R. Co. v. Fifth Baptist Church*, 27 L.Ed. 739, 108 U.S. 317, 2 S.C. 719 (1882), the church brought suit for damages caused by the dust, smoke and noise generated by the railroad company's engine house and repair shop. The facility had been located under grant of authority from Congress and claimed this as a defense. The Supreme Court held that the grant of authority was "no answer to the action of the plaintiff," saying: "It admits indeed of grave doubt whether Congress

could authorize the company to occupy and use any premises within the city limits, in a way which would subject others to physical discomfort and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the company from liability to sue for damages or compensation, to which individuals acting without such authority would be subject under like circumstances. Without expressing any opinion on this point, it is sufficient to observe that such authority would not justify an invasion of others property to an extent which would amount to an entire deprivation of its use and enjoyment, without compensation to the owner. Nor could such authority be invoked to justify acts, creating physical discomfort and annoyance to others in the use and enjoyment of their property, to a less extent than entire deprivation if different places from those occupied could be used by the corporation for its purposes, without causing such discomfort and annoyances."

Thus, while appearing to state an absolute rule, where the deprivation is less than a taking of the whole, the court entered into a consideration of whether alternate means and methods could have been employed which would not have caused the discomfort and annoyance.

Later, in *Richards v. Washington Terminal Co.*, 233 U.S. 546, 58 L.Ed 1088, 34 S.Ct. 654 (1914), the plaintiff brought suit against the defendant for smoke, dust, noise and vibration caused by the operation of the railroad through a tunnel which opened near the plaintiff's property. The court distinguished British authority and said:

"We deem the true rule under the Fifth Amendment, as under State constitutions containing a similar prohibition, to be that while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use.

Thereafter, the court posed this question "what is to be deemed a private nuisance such as amounts to a taking of property?" The answer was that railroads are not to be subject to damages "in the absence of negligence." Thus, while appearing to state an absolute rule, the court examined the record looking for negligence, and reversed a judgment rendered for the plaintiff and remanded for an allocation of damages purely the result of negligence, while disallowing damages naturally incident to the operation of the railroad.

Other cases relied upon by the American Jurisprudence editors to support what is said to be the majority rule as described in Section 465, and discussed above, while appearing to state an absolute rule each are based upon a finding of either negligence, improper siting, or are dicta. *Yaffe v. Ft. Smith* 178 Ark, 406, 10 SW2d 886, 61 A.L.R. 1138 (1928); *Steele v. Queen City Broadcasting Company*, 341 P2d 499 (Wash. 1959). In *Yaffe*, there was evidence of negligent and improper operation of a junk yard which was found to be a nuisance and in *Steele* the court's statement was dicta, as the court found that the government authority to build the offending television tower was improperly granted.

Some courts have disregarded the foregoing authorities completely and have held flatly that a facility or activity authorized by Congress or a Federal instrumentality cannot constitute a nuisance at all. *Potomac River Association, Inc. v. Lundberg Maryland Seamanship School, Inc.*, 402 F.Supp. 344 (D.Maryland 1975) ("the corps may immunize acts which would otherwise be nuisances in much the same way as zoning under a state's police power may cause some curtailment of rights by restricting uses"; corps of engineers authorized defendant to dredge and fill land along a navigable creek to plaintiff's damage.); *State of Mo. Ex. Rel. Ashcroft v. Dept. of Army, Etc.*, 526 F.Supp. 660 (WD Mo, 1980) ("the court will not hold conduct to constitute a nuisance where authority

therefore exists by virtue of legislative enactment." Hydro-electric plant not a nuisance).

In *McMahon v. City of Dubuque*, 255 F.2d 154 (8th Cir., 1958), an allegation that the exercise of zoning powers operated as a taking, the court noted: "Every zoning regulation affects property already owned by individuals and causes some curtailment of the rights of such owners by restricting prospective uses. Thus it may be said to lay an uncompensated burden upon some property owners. However, this is not regarded as depriving the owner of his property or such use of it as he may desire to make. It is merely a restraint upon the use of it for the protection of the general well-being, that is, to prevent harm to the public." *Id.* at 160.

In analyzing the foregoing, it appears that while the pending dispute is unique, counsel having cited no cases on point and the Court's own research revealing none, it is far from unknown in Iowa and American jurisprudence that legislature or congress may determine that a facility or activity is so important for the general public good that some detriment and burden by affected property owners must be borne by them, uncompensated.

The legislative declaration contained in Section 352.1, Code of Iowa (1995) recognizing the importance of agriculture in the Iowa economy conforms with the view judicially noted by the Iowa Supreme Court that agriculture is our "leading industry". *Benschoter v. Hakes*, 232 Iowa 1354, 8 NW2d 481 (1943).

A common thread running through the cases cited above and cases read but not cited by this Court is that certain public improvements and activities are so important that they simply must occur. The analysis given is often focused upon whether the given facility or activity was improperly placed, or was negligently operated, and under this analysis, a wide variety of important commercial activities, invested with substantial public interest, have

been permitted to occur, although adjoining neighbors might suffer thereby. These have included oil refineries, railroad tracks, railroad repair yards, hydroelectric dams, levies, television towers and the like. Given the legislative and judicial recognition of the importance of agriculture in our economy, farming activities including livestock production must be included with the foregoing.

As noted first above, the Plaintiffs make a facial attack against Section 352.11. The foregoing discussion makes clear that the facial attack, under the standard of analysis described first above, must fail. Whether the operation of a farming enterprise in an agricultural area in the future, absent negligence and in conformity with State and Federal environmental regulations could rise, as applied, to a nuisance and a "taking" under the Fifth Amendment, cannot now be decided.

#### RES JUDICATA

With the constitutional objections to the mentioned statute resolved, the Court now turns to the non-constitutional arguments advanced by the Plaintiffs and first addresses the claim that the November, 1994 denial of the ag area designation by the board is res judicata.

The plaintiffs correctly say that the doctrine of res judicata may apply to a tribunal, not a court, which exercises judicial functions. The doctrine of res judicata serves the salutary purpose of preventing repetitive litigation over issues which have previously been finally determined by a judicial or quasi-judicial body. It means "the thing is decided." It is applicable to an administrative adjudication if and only if the performing officer or body is acting in a quasi-judicial capacity. *Board of Supervisors, Carroll County v. Chicago & Northwest Transp. Co.*, 260 NW2d 813 (Iowa 1977).

In a closely analogous proceeding involving a rezoning request, the Supreme Court held that while under a county or city zoning procedure, the board of adjustment is a

quasi-judicial body, in considering a rezoning request or an amendment to a zoning ordinance, the board of supervisors or city council sits not in a judicial capacity but in a legislative capacity. *Montgomery v. Bremer County Board of Supervisors*, 299 NW2d 687 (Iowa 1980). In this case, the board of supervisors is statutorily required to conduct a comment-argument type of hearing of which the public is required to have advance notice. Like the board in *Montgomery*, however, the hearing here did not include cross-examination, evidence was not taken under oath, and the Court concludes that the Board was acting in a legislative and not a quasi-judicial capacity in passing upon the ag area petition. Since the Board of Supervisors was not acting in a quasi-judicial capacity, it follows the principles of res judicata do not apply.

#### ARBITRARY AND CAPRICIOUS

"A writ of certiorari shall only be granted when specifically authorized by statute; or where an inferior tribunal, board or officer, exercising judicial functions, is alleged to have exceeded its, or his proper jurisdiction or otherwise acted illegally." Iowa Rule of Civil Procedure 306; *Frank Hardy Advertising, Inc. v. City of Dubuque Zoning Board of Adjustment*, 501 NW2d 521, 523 (Iowa 1993). "In certiorari it is neither the function nor the privilege of the court to pass upon the wisdom or soundness of an inferior tribunal's discretion, but its review is restricted to jurisdiction and legality." *Smith v. City of Fort Dodge*, 160 NW 2d 492, 498 (Iowa 1968). An illegality is established if the inferior tribunal has not acted in accordance with a statute, if its decision was not supported by substantial evidence, or if its actions were unreasonable, arbitrary, or capricious. *Asmann v. Board of Trustees of Police Retirement Sys.*, 345 NW2d 136, 138 (Iowa 1984). The plaintiff in a certiorari action challenging the action was illegal. *Norland v. Worth County Compensation Board*, 323 NW2d 251, 252 (Iowa 1982). A finding of "illegality" as described above does not require or suggest a finding

that the board or its members acted in bad faith. It is merely the word chosen by the law to describe the circumstance in which the particular tribunal's action cannot be permitted to stand. The Iowa Supreme Court has observed:

"(It) does not imply a bad motive, or a wrongful purpose or perversity, passion, prejudice, partiality, moral delinquency, willful misconduct or intentional wrong. We shall not undertake to formulate a general definition of the term 'abuse of discretion'. It does not imply reproach."

In this case one Board member indicated he voted affirmatively in favor of the establishment of the agricultural area after having weighed the arguments and found them to be equal, he flipped a coin. Another Supervisor analogized with the granting of a driver's license, and felt that the Board had no discretion to permit or deny the establishment of an agricultural area so long as the application was in proper form, the Board was compelled to approve it.

The Attorney General has ruled, however, that the Board does have discretion to consider whether in the words of the statute, the establishment of an agricultural area would be inconsistent with the purposes of this chapter with reference to the statement of purposes contained in Section 352.1. The Attorney General has ruled, correctly in the opinion of this Court, that the Board does have discretion to reject a proposed agricultural area upon a specific finding that the policy in favor of agricultural land preservation is in a given case outweighed by other policy considerations set forth in the chapter. Opinion of the Attorney General (Weeg to Beine, Cedar County Attorney, February 9, 1983) Opinion No. 83-2-5. The words of Section 352.7(2) say the Board "shall adopt" the proposal or any modification "unless to do so would be inconsistent with the purposes of this chapter." The foregoing

language obviously invests the Board with discretion, and also imposes a duty to make appropriate inquiry at the hearing as to whether the "purposes of the act" are served or not served by granting the petition. Although speaking in a different context, in reference to judicial discretion, the Supreme Court has said that that discretion must be exercised. A prominent Iowa judge has said: "When the trial court has discretion, the judge must recognize and exercise it, and failure to do either is reviewable." Fagg, *A Judge's View of Trial Practice*, 28 Drake L.Rev. 1 (1978-79).

The Supreme Court has said:

A refusal or failure to exercise discretion will not be affirmed by demonstrating that the result reached could have been the same upon the exercise of the withheld discretion (citation is omitted) because the trial court had discretion to either allow or disallow the motion for production it was required to exercise it. The duty to exercise discretion was not discharged. *Sullivan v. Chicago & Northwestern Transportation Co.*, 326 N.W.2d 320 (Iowa 1982).

See also *State v. Hildebrand*, 280 N.W.2d 393 (Iowa 1979).

While the Court is sympathetic to the position of the Board of Supervisors, and is somewhat inclined to believe that the Supervisor who says he "flipped a nickel" was being facetious, the Court cannot ignore nor sanction public action decided by chance. That is the very definition of "capricious". Further, the act appears to vest discretion in the Board and require its prudent exercise. To falsely believe that one has no discretion is also arbitrary and capricious. The action of the Board must be annulled and this matter remanded to be considered again by the Board, after proper statutory notice, guided by this opinion, and that of the Attorney General.

## SUMMARY

The Court summarizes its Findings as follows:

1. Section 352.11 is not unconstitutional in violation of Article I, Section I of the Iowa Constitution.
2. Although finding that no taking has occurred, the Court finds and concludes that any taking that has occurred is for a public use and not a private use.
3. No physical taking without just compensation has occurred and Section 352.11 does not therefore violate the Fifth Amendment proscription.
4. No regulatory taking has occurred in violation of the Fifth Amendment prohibition.
5. The hearing contemplated by Section 352.11 provided appropriate procedural due process.
6. In passing upon the agricultural area petition, the Board acted in a legislative and not quasi-judicial capacity and subsequent action after prior disapproval is not barred by the doctrine of res judicata.
7. The votes of two Supervisors were accompanied by such error or infirmity that the final Board action approving the agricultural area in question here is arbitrary and capricious and must therefore be annulled.

## JUDGMENT

IT IS THE ORDER, JUDGMENT AND DECREE of the Court as follows:

1. The foregoing summary of Findings is herein incorporated by this reference.
2. The writ of certiorari is sustained in that the error or infirmity in the Board's action has been demonstrated, and this matter must be and is hereby **ORDERED** remanded to the Kossuth County Board of Supervisors for further proceedings as provided by law.

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3. The costs of this action to be taxed by the Clerk in the sum of \$115.00 are hereby taxed against and shall be paid by the Defendants.

SO ORDERED this 30th day of July, 1996.

/s/ Patrick M. Carr  
PATRICK M. CARR, Judge  
Third Judicial District of Iowa

APPENDIX C

[Filed Dec. 2, 1996]

IN THE IOWA DISTRICT COURT  
FOR KOSSUTH COUNTY

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Law No. 23313

CLARENCE BORMANN and CAROLINE BORMANN, Husband  
and Wife; LEONARD MCGUIRE (deceased) and CECELIA  
MCGUIRE, Husband and Wife,

*Plaintiffs,*

-vs-

THE BOARD OF SUPERVISORS IN AND FOR KOSSUTH  
COUNTY, IOWA, and JOE RAHM, AL DUDDING, LAUREL  
FANTZ, JAMES BLACK and DONALD MCGREGOR, In  
their Capacities as Members of the Board of Super-  
visors,

*Defendants.*

GERALD GIRRES, JOAN GIRRES, MIKE GIRRES, NORMA  
JEAN THUL, JERALD THILGES, SHIRLEY THILGES,  
THELMA THILGES, EDWIN REDING, RALPH REDING,  
LORETTA REDING, BERNARD THILGES, JACOB THILGES,  
JOHN GOECKE, and PATRICIA GOECKE,

*Intervenors.*

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ORDER OF COURT UPON RULE 179(b) MOTION

On July 31, 1996, the Court filed its Findings, Con-  
clusions and Judgment in the above proceeding. On  
August 8, 1996, the Plaintiffs filed a Motion for Enlarge-  
ment, Amendment, Modification, Or Substitution of Con-  
clusions under I.R.C.P. 179(b). At the suggestion of  
counsel, the Court deferred ruling on the same in anticipa-

tion of the receipt of an opinion by the Iowa Supreme Court in *Weinhold v. Wolff*, — NW(2) — (Iowa 1996) (Supreme Court No. 94-1589, filed October 23, 1996). That opinion has now been received and considered. The opinion contains language capable of supporting the position of each party, but the language noted is not central to the Court's opinion. The Court has also received and studied the Plaintiffs' memorandum. Deeming itself fully advised the Court enters the following order.

It should be first stated that the issues framed by the pleadings in this case presented novel, difficult and close issues for judicial determination, which the parties have vigorously and ably contested. The Court's Judgment filed July 31, 1996 represented its best judgment as to the issues thus presented. With this in mind, the Court turns to the two specific issues raised by the Plaintiffs' motion.

# I

The Plaintiffs' first inquiry questions the harmony of the Court's reading of the *May's Drug Stores v. State Tax Commission*, 242 Iowa 319, 45 (NW(2) 245 (1951), and *State v. Ward*, 170 Iowa 185, 152 NW 501 (1915). Simply stated, the Court was unable to extrapolate from *State v. Ward* the proposition for which it was cited, that the legislature may not constitutionally limit a property owner's right to bring a common law nuisance action. The Court concludes that the fact-based decisions in *Baltimore and Potomac R.R. Co. v. Fifth Baptist Church*, 108 U.S. 317 (1882) and *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914), rested, as did the legislative determination in enacting the statute under attack, upon an inquiry weighing the burden visited upon adjacent owners against the negligent siting and operation of the offending improvements. The Court concluded that this requires an ad hoc, fact-based inquiry not capable of determination in this proceeding.

## II

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the statutory scheme found unconstitutional required the property owner affected to suffer a physical invasion of his property as a condition of receiving a building permit. In this case, the physical invasion is not required or authorized. The Iowa Supreme Court has drawn this distinction. *Ryan v. City of Emmetsburg*, 232 Iowa 600, 4 NW(2) 435 (1942). The Plaintiffs again draw the Court's attention to *Churchill v. Burlington Water Company*, 94 Iowa 89, 62 N.W. 646 (1895). They argue with some logic that the uncompensated taking of an easement which would authorize a physical invasion as in *Nollan* is not much different from the effect of the statute *sub judice* which they say requires adjoining property owners to give an uncompensated nuisance or "pollution" easement. The distinction is indeed thin. Given the strong presumption of constitutionality accorded legislative enactments, and in light of the similar distinction drawn by the Supreme Court in such cases as *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the court is constrained to find the statute constitutional upon facial attack.

Based on the foregoing, IT IS ORDERED that the Rule 179(b) Motion is hereby overruled as to each asserted ground.

SO ORDERED this 30th day of November, 1996.

/s/ Patrick M. Carr  
PATRICK M. CARR, Judge  
Third Judicial District of Iowa

## APPENDIX D

## KOSSUTH COUNTY BOARD OF SUPERVISORS

On February 7, 1995, a Ag Area Petition was filed with the Kossuth County Board of Supervisors, heard by public hearing on the 14th day of March 1995, and approved. An appeal was taken, the Iowa District Court in its Findings, Conclusions and Judgement, stated the previous action of the Board of Supervisors must be annulled, and this matter remanded to be considered again by the Board, after proper statutory notice, guided by this opinion, and that of the Attorney General. On September 3rd, 1996, pursuant to Iowa Code Section 352.7(1), after the required public notice, the Board of Supervisors held a public hearing on this petition and received public comment.

The Board finds that the petition to create the agricultural area complies with Iowa Code Section 352.6 and that adoption of the proposed agricultural area is consistent with the purposes of Chapter 352. Therefore, on September 3, 1996, the County Board of Supervisors, on a motion made and seconded, adopts the following described agricultural area.

Property owners: Gerald & Joan Girres, Mike Girres, Norma Jean Thul, Jerald J. & Shirley B. Thilges, Thelma & Edwin Thilges, Ralph & Loretta Reding, Bernard H. Thilges, Jacob Thilges, Patricia A. & John E. Goecke  
Size: 960 acres, more or less.

Legal Description attached hereto.

Description of Boundaries: Riverdale Twp. as more particularly shown on the attached map, incorporated herein by reference.

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September 3, 1996

/s/ Joe Rahm  
JOE RAHM, Chairman  
Kossuth County  
Board of Supervisors

September 3, 1996

/s/ Delores Dodds Thilges  
DELORES DODDS THILGES  
Kossuth County Auditor

## APPENDIX E

## STATUTORY PROVISIONS INVOLVED

COUNTY LAND PRESERVATION  
AND USE COMMISSIONS**352.1 Purpose.**

It is the intent of the general assembly and the policy of this state to provide for the orderly use and development of land and related natural resources in Iowa for residential, commercial, industrial, and recreational purposes, preserve private property rights, protect natural and historic resources and fragile ecosystem of this state including forests, wetlands, rivers, streams, lakes and their shorelines, aquifers, prairies, and recreational areas to promote the efficient use and conservation of energy resources, to promote the creation and maintenance of wildlife habitat, to consider the protection of soil from wind and water erosion and preserve the availability and use agricultural land for agricultural production, through processes that emphasize the participation of citizens and local governments.

The general assembly recognizes the importance of preserving the state's finite supply of agricultural land. Conversion of farmland to urban development, and other nonfarm uses, reduces future food production capabilities and may ultimately undermine agriculture as a major economic activity in Iowa.

It is the intent of the general assembly to provide local citizens and local governments the means by which agricultural land may be protected from nonagricultural development pressures. This may be accomplished by the creation of county land preservation and use plans and policies, adoption of an agricultural land preservation ordinance, or establishment of agricultural areas in which substantial agricultural activities are encouraged, so that

land inside these areas or subject to those ordinances is conserved for the production of food, fiber, and livestock, thus assuring the preservation of agriculture as a major factor in the economy of this state.

### **352.2 Definitions.**

As used in this chapter unless the context otherwise requires:

1. "*Agricultural area*" means an area meeting the qualifications of section 352.6 and designated under section 352.7.
2. "*County board*" means the county board of supervisors.
3. "*County commission*" mean the county land preservation and use commission.
4. "*Farm*" means the land, buildings, and machinery used in the commercial production of farm products.
5. "*Farmland*" means those parcels of land suitable for the production of farm products.
6. "*Farm operation*" means a condition of activity which occurs on a farm in connection with the production of farm products and includes but is not limited to the raising, harvesting, drying, or storage of crops; the care or feeding of livestock; the handling or transportation of crops or livestock; the treatment or disposal of wastes resulting from livestock; the marketing of products at roadside stands or farm markets; the creation of noise, odor, dust, or fumes; the operation of machinery and irrigation pumps; ground and aerial seeding and spraying; the application of chemical fertilizers, conditioners, insecticides, pesticides, and herbicides; and the employment and use of labor.
7. "*Farm products*" means those plants and animals and their products which are useful to people and includes

but is not limited to forages and sod crops, grains and feed crops, dairy and dairy products, poultry and poultry products, livestock, fruits, vegetables, flowers, seeds, grasses, trees, fish, honey, and other similar products, or any other plant, animal, or plant or animal product which supplies people with food, feed, fiber, or fur.

8. "*Livestock*" means the same as defined in section 267.1.

9. "*Nuisance*" means a public or private nuisance as defined either by statute, administrative rule, ordinance, or the common law.

10. "*Nuisance action or proceeding*" means an action, claim or proceeding, whether brought at law, in equity, or as an administrative proceeding, which is based on nuisance.

\* \* \* \*

### **352.6 Creation or expansion of agricultural areas.**

An owner of farmland may submit a proposal to the county board for the creation or expansion of an agricultural area within the county. An agricultural area, at its creation, shall include at least three hundred acres of farmland; however, a smaller area may be created if the farmland is adjacent to farmland subject to an agricultural land preservation ordinance pursuant to section 335.27 or adjacent to land located within an existing agricultural area. The proposal shall include a description of the proposed area to be created or expanded, including its boundaries. The territory shall be as compact and as nearly adjacent as feasible. Land shall not be included in an agricultural area without the consent of the owner. Agricultural areas shall not exist within the corporate limits of a city. The county board may consult with the department of natural resources when creating or expanding an agricultural area contiguous to a location which is under the direct super-

vision of the department, including a state park, state preserve, state recreation area, or sovereign lake. Agricultural areas may be created in a county which has adopted zoning ordinances. Except as provided in this section, the use of the land in agricultural areas is limited to farm operations.

1. The following shall be permitted in an agricultural area:

*a.* Residences constructed for occupation by a person engaged in farming or in a family farm operation. Non-conforming preexisting residences may be continued in residential use.

*b.* Property of a telephone company, city utility as defined in Section 390.1, public utility as defined in section 476.1, or pipeline company as defined in section 479.2.

2. The county board of supervisors may permit any use not listed in subsection 1 in an agricultural area only if it finds all of the following:

*a.* The use is not inconsistent with the purposes set forth in section 352.1.

*b.* The use does not interfere seriously with farm operations within the area.

*c.* The use does not materially alter the stability of the overall land use pattern in the area.

### **352.7 Duties of county board.**

1. Within thirty days of receipt of a proposal to create or expand an agricultural area which meets the statutory requirements, the county board shall provide notice of the proposal by publishing notice in a newspaper of general circulation in the county. Within forty-five days after receipt of the proposal, the county board shall hold a public hearing on the proposal.

2. Within sixty days after receipt, the county board shall adopt the proposal or any modification of the proposal it deems appropriate, unless to do so would be inconsistent with the purposes of this chapter.

**352.8 Requirement that description of agricultural areas be filed with the county.**

Upon the creation or expansion of an agricultural area, its description shall be filed by the county board with the county auditor and placed on record with the recording officer in the county.

**352.9 Withdrawal.**

At any time after three years from the date of creation of an agricultural area, an owner may withdraw from an agricultural area by filing with the county board a request for withdrawal containing a legal description of the land to be withdrawn and a statement of the reasons for the withdrawal. The county board shall, within sixty days of receipt of the request, approve or deny the request for withdrawal. At any time after six years from the date of creation of an agricultural area, an owner may withdraw from an agricultural area by filing with the county board a notice of withdrawal containing a legal description of the land to be withdrawn.

The board shall cause the description of that agricultural area filed with the county auditor and recording officer in the county to be modified to reflect any withdrawal. Withdrawal shall be effective on the date of recording. The agricultural area from which the land is withdrawn shall continue in existence even if smaller than three hundred acres after withdrawal.

\* \* \* \*

**352.11 Incentives for agricultural land preservation—  
payment of costs and fees in nuisance actions.**

1. *Nuisance restriction.*
  - a. A farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date or expansion of the agricultural activities of the farm or farm operation. This paragraph shall apply to a farm operation conducted within an agricultural area for six years following the exclusion of land within an agricultural area other than by withdrawal as provided in section 352.9.
  - b. Paragraph "a" does not apply to a nuisance which is the result of a farm operation determined to be in violation of a federal statute or regulation or state statute or rule. Paragraph "a" does not apply if the nuisance results from the negligent operation of the farm or farm operation. Paragraph "a" does not apply to actions or proceedings arising from injury or damage to a person or property caused by the farm or a farm operation before the creation of the agricultural area. Paragraph "a" does not affect or defeat the right of a person to recover damages for an injury or damage sustained by the person because of the pollution or change in condition of the waters of a stream, the overflowing of the person's land, or excessive soil erosion onto another person's land, unless the injury or damage is caused by an act of God.
  - c. A person shall not bring an action or proceeding based on a claim of nuisance arising from a farm operation unless the person proceeds with mediation as provided in chapter 654B.
  - d. If a defendant is a prevailing party in an action or proceeding based on a claim of nuisance and arising from a farm operation conducted on farmland within an agricultural area, the plaintiff shall pay court costs and rea-

sonable attorney fees incurred by the defendant, if the court determines that the claim is frivolous.

2. *Water priority.* In the application of a permit to divert, store, or withdraw water and in the allocation of available water resources under a water permit system, the department of natural resources shall give priority to the use of water resources by a farm or farm operation, exclusive of irrigation, located in an agricultural area over all other uses except the competing uses of water for ordinary household purposes.

### **352.12 State regulation.**

In order to accomplish the purposes set forth in section 352.1, a rule adopted by a state agency after July 1, 1982 which would restrict or regulate farms or farm operations may contain standards which are less restrictive for farms or farm operations inside an agricultural area than for farms or farm operations outside such an area. A rule containing such a discrimination shall not for the fact of such discrimination alone be found or held to be unreasonable, arbitrary, capricious, beyond the authority delegated to the agency, or characterized by an abuse of discretion.

## APPENDIX F

State Right-to-Farm Laws  
Nuisance Defenses

State	Provision Parallel To Iowa Code § 352.11
Alabama	Ala. Code § 6-5-127
Alaska	Alaska Stat. § 09.45.235
Arizona	Ariz. Rev. Stat. § 3-112
Arkansas	Ark. Code Ann. § 2-4-107
California	Cal. Civ. Code §§ 3482.5-.6
Colorado	Colo. Stat. § 35-3.5-102
Connecticut	Conn. Gen. Stat. Ann. § 19a-341
Delaware	Del. Code tit. 3, § 1401
Florida	Fla. Stat. Ann. § 823.14
Georgia	Ga. Code Ann. § 41-1-7
Hawaii	Haw. Rev. Stat. Ann. § 165-4
Idaho	Idaho Code §§ 22-4503 to -4504
Illinois	740 Ill. Comp. Stat. 70/3
Indiana	Ind. Code Ann. § 34-19-1-4
Kansas	Kan. Stat. §§ 2-3202, 47-1505
Kentucky	Ky. Rev. Stat. Ann. § 413.072
Louisiana	La. Rev. Stat. Ann. § 3:3603
Maine	Me. Rev. Stat. tit. 17, § 2805
Maryland	Md. Code Ann., Cts. & Jud. Proc. § 5-403
Massachusetts	Mass. Gen. Laws ch. 243, § 6
Michigan	Mich. Comp. Laws § 286.473
Minnesota	Minn. Stat. Ann. § 561.19
Mississippi	Miss. Code Ann. § 95-3-29
Missouri	Mo. Rev. Stat. § 537.295

State	Provision Parallel To Iowa Code § 352.11
Montana	Mont. Code Ann. § 27-30-101
Nebraska	Neb. Rev. Stat. § 2-4403
Nevada	Nev. Rev. Stat. § 40.140
New Hampshire	N.H. Rev. Stat. Ann. §§ 432:33-:34
New Jersey	N.J. Stat. § 4:1C-10
New Mexico	N.M. Stat. Ann. § 47-9-3
New York	N.Y. Agric. & Mkts. Law § 308
North Carolina	N.C. Gen. Stat. § 106-701
North Dakota	N.D. Cent. Code § 42-04-02
Ohio	Ohio Rev. Code Ann. § 929.04
Oklahoma	Okla. Stat. Ann. tit. 2, § 9-210 Okla. Stat. Ann. tit. 50, § 1.1
Oregon	Or. Rev. Stat. §§ 30.936-.937
Pennsylvania	3 Pa. Cons. Stat. Ann. §§ 911, 954
Rhode Island	R.I. Gen. Laws § 2-23-5
South Carolina	S.C. Code § 46-45-30
South Dakota	S.D. Codified Laws §§ 21-10-25.2, -4 to -6
Tennessee	Tenn. Code Ann. §§ 43-26-103, 44-18-102
Texas	Tex. Agric. Code Ann. § 251.004-.006
Utah	Utah Code Ann. § 78-38-7
Vermont	Vt. Stat. Ann. tit. 12, § 5753
Virginia	Va. Code § 3.1-22.29
Washington	Wash. Rev. Code Ann. § 7.48.305
West Virginia	W. Va. Code § 19-19-4
Wisconsin	Wis. Stat. Ann. § 823.08
Wyoming	Wyo. Stat. §§ 11-39-102, -103, 11-44-103







**QUESTION PRESENTED**

Are “right to farm” laws—enacted by all fifty States—facially unconstitutional as a *per se* taking in violation of the Takings Clause of the Fifth Amendment to the United States Constitution?

**PARTIES TO THE PROCEEDINGS**

Petitioners, intervenors before the District Court for Kossuth County and intervenors-appellees before the Iowa Supreme Court, are Gerald Girres, Joan Girres, Mike Girres, Norma Jean Thul, Jerald Thilges, Shirley Thilges, Thelma Thilges, Edwin Reding, Ralph Reding, Loretta Reding, Bernard Thilges, Jacob Thilges, John Goecke, and Patricia Goecke. The Board of Supervisors for Kossuth County and Joe Rahm, Al Dudding, Laurel Fantz, James Black, and Donald McGregor—in their capacities as members of the Board of Supervisors—were defendants before the District Court and appellees before the Iowa Supreme Court, and are respondents in this Court under S. Ct. Rule 12.6. They supported petitioners' position below.

Respondents Clarence Bormann, Caroline Bormann, Leonard McGuire, and Cecelia McGuire were plaintiffs before the District Court and appellants before the Iowa Supreme Court.

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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1998

\_\_\_\_\_  
No. 98-\_\_\_\_\_  
\_\_\_\_\_

GERALD GIRRES, *et al.*,  
v. *Petitioners,*

CLARENCE BORMANN, *et al.*,  
\_\_\_\_\_  
*Respondents.*

Petition for a Writ of Certiorari to the  
Supreme Court of Iowa

\_\_\_\_\_  
**PETITION FOR A WRIT OF CERTIORARI**  
\_\_\_\_\_

Petitioners Gerald Girres, *et al.*, respectfully petition for a writ of certiorari to review the judgment of the Iowa Supreme Court in this case.

**OPINIONS BELOW**

The opinion of the Iowa Supreme Court is reported at 584 N.W.2d 309 and reproduced in the appendix hereto ("App.") at 1a. The opinion of the District Court for Kossuth County is unreported and reproduced at App. 27a. The order of the Board of Supervisors for Kossuth County is unreported and reproduced at App. 63a.

**JURISDICTION**

The judgment of the Iowa Supreme Court was entered on September 23, 1998. App. 1a. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Takings Clause of the Fifth Amendment to the United States Constitution provides that "nor shall private property be taken for public use without just compensation." The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall \* \* \* deprive any person of life, liberty, or property, without due process of law." The pertinent provisions of Iowa's right to farm law, Iowa Code § 352, are reproduced at App. 65a-71a.

### RULE 29.4(c) STATEMENT

Pursuant to S. Ct. Rule 29.4(c), petitioners note that this proceeding calls into question the constitutionality of Iowa Code § 352.11(1)(a), and that neither the State of Iowa nor any agency, officer, or employee thereof is a party. Accordingly, 28 U.S.C. § 2403(b) is applicable and petitioners have served this petition on the Attorney General of Iowa.

### INTRODUCTION

Every State in the Union has enacted a "right to farm" law to help preserve agricultural land in the face of suburban sprawl and other pressures on agriculture and agricultural land. Like the Iowa law at issue in this case, those laws typically provide farmers a qualified defense to nuisance actions brought by nearby residents complaining about the normal incidents of today's farm life. In this case the Iowa Supreme Court held that Iowa's right to farm law violated the Takings Clause of the Federal Constitution because it effected an uncompensated taking of the nearby residents' right to bring such a nuisance action. The court reached this conclusion even though the record was devoid of any indication that the nuisance defense had been triggered, and without engaging in the balancing of competing interests that this Court has held is normally required in assessing federal takings claims. Instead, the court struck down the Iowa law on its face as a *per se*

taking—a category this Court has held is restricted to governmental actions that either deprive a landowner of all economic use of property or physically invade the property that has been “taken.” The Iowa Supreme Court thus expressly departed from this Court’s precedents and held that a government regulation that did not effect a physical invasion or deprive the landowner of all economic use may nonetheless constitute a taking *per se*.

The decision of the Iowa Supreme Court not only conflicts sharply with this Court’s takings jurisprudence, but calls into question the constitutionality of right to farm laws in each of the other 49 States. This Court should grant certiorari to confirm that the legislative adjustment of competing land use claims embodied in right to farm laws is not a *per se* violation of the United States Constitution.

#### STATEMENT OF THE CASE

The American experiment is rooted in no small measure in the agrarian ideal. In 1790 ninety-five percent of the population lived in a rural, agricultural setting. Agriculture was key to the Nation’s fledgling economy, and the family farm critical to many citizens’ survival. To many—most notably, Thomas Jefferson—farming was thought to be indispensable to cultivating the democratic values and ideals necessary to sustain the new Republic. De Tocqueville called America’s agrarian character “one of the first causes of the maintenance of republican institutions in the United States.” I *Democracy in America* 290 (Vintage Books ed. 1990). In time, of course, agrarianism gave way to industrialism and a more urban society, but the agrarian ideal remains fixed in our national psyche, and agriculture and the family farm continue to play a vital role in the Nation’s economy.

With the decline of agrarianism, federal and state governments have legislated numerous programs aimed at assisting farmers and promoting agricultural activities in this country. In the late 1970s and early 1980s, States began passing “right to farm” laws in response to the

pressures that suburban sprawl and other developments imposed on existing farming operations. These laws—which have been adopted by every State, *see* App. 72a-73a—seek to protect farms from the pressures of a more urbanized society, thereby preserving each State's agricultural base. Though varying in their particulars, right to farm laws typically afford farmers a qualified defense to nuisance actions brought by neighbors who object to the normal incidents of today's farming operations.

Iowa enacted its right to farm law in 1982 pursuant to the State's policy "to provide for the orderly use and development of land and related natural resources in Iowa." Iowa Code § 352.1. The stated purpose of the law is to preserve "the state's finite supply of agricultural land" by allowing "establishment of agricultural areas in which substantial agricultural activities are encouraged, so that land inside these areas \* \* \* is conserved for the production of food, fiber, and livestock, thus assuring the preservation of agriculture as a major factor in the economy of this state." *Id.* To advance this end, Section 352.11(1)(a) of the law provides that "[a] farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation."<sup>1</sup>

The nuisance defense provided by Section 352.11(1)(a) is, however, not absolute. It applies only to land used for agricultural production, and is not available if: (1) the nuisance results from a farm operation determined to be in violation of a federal or state statute or rule; (2) the nuisance results from the negligent operation of the farm;

<sup>1</sup> Under the statute, an owner of farmland may submit an application with a county board to have land designated an "agricultural area" subject to the Act. Iowa Code § 352.6. The county board must give notice of an application to form an agricultural area. *Id.* § 352.7. After the agricultural area has been in place for six years, an owner may withdraw land from a designated agricultural area upon notice to the same county board. *Id.* § 352.9.

(3) the injury or damage complained of occurred before the creation of the agricultural area; or (4) the damage complained of was caused by pollution or a change in conditions of the waters of a stream, the “overflowing” of the objecting person’s land, or excessive soil erosion onto that person’s land. Iowa Code § 352.11(1)(b).

The facts in this case are not in dispute. In January 1995, petitioners, individuals who own 960 acres of land in Kossuth County, Iowa, requested that the Kossuth County Board of Supervisors designate their land as an agricultural area within the meaning of the state law. *Id.* § 352.6. The Board found that the proposed agricultural area met the statutory requirements and was consistent with the purposes set forth by the Iowa General Assembly, and approved petitioners’ request. App. 63a. Respondents—petitioners’ neighbors—challenged the Board’s approval of the agricultural area in Kossuth County District Court. They alleged, among other things, that the Board’s action deprived them of property without just compensation under both the Federal and Iowa Constitutions, App. 40a, on the ground that the designation of the land as an agricultural area automatically entitled petitioners to “nuisance immunity,” even though respondents presented “neither allegations nor proof of nuisance.” App. 6a.

The District Court rejected that contention. It began its analysis by noting that the plaintiffs were mounting “a facial challenge” to the law, and that “[i]t is not alleged that any of the [petitioners] are at this time maintaining a nuisance upon their premises.” App. 34a. The court explained that this Court’s precedents found a *per se* taking only in cases of physical invasion or when government regulation deprived a landowner of all economically viable uses of property. The court noted that the Iowa right to farm law neither effected a physical invasion of any property, nor deprived neighboring landowners of all uses of their property. As the District Court explained, “[t]he Supreme Court has been markedly disinclined to find a

regulatory taking where only one or two sticks in the 'bundle of rights' that are part and parcel of the ownership of real property have been impaired," and here "the challenged legislation impairs but does not eliminate one of the many 'sticks' in the bundle of rights, and \* \* \* represents the legislature's judgment in adjusting property rights, but does not amount to a taking." App. 46a.

The District Court also reviewed precedents considering whether the establishment of a nuisance could constitute a taking, but concluded that the plaintiffs could not rely on such a theory in a facial challenge. As the court explained, "[w]hether the operation of a farming enterprise in an agricultural area in the future, absent negligence and in conformity with State and Federal environmental regulations could rise, as applied, to a nuisance and a 'taking' under the Fifth Amendment, cannot now be decided." App. 54a. The District Court later denied plaintiffs' request for reconsideration. App. 60a.

The Iowa Supreme Court reversed. That court ruled that the Board's action in creating the agricultural area, thereby permitting petitioners to assert the nuisance defense under Iowa Code § 352.11(1)(a) in the event they were sued for nuisance and none of the statutory exceptions applied, was an unconstitutional *per se* taking under the Fifth Amendment to the United States Constitution and Article I, Section 18 of the Iowa Constitution. The court began its analysis by noting that "the facts are not in dispute" and that the "only question is a legal one." App. 5a. It also recognized that respondents' challenge was "a facial one because [they] have presented neither allegations nor proof of nuisance." App. 5a-6a.

The Iowa Supreme Court noted that two categories of government action require compensation without any inquiry into additional factors: (1) a physical invasion, or (2) regulation that denies all economically beneficial use of the property. App. 14a (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)). Respond-

ents conceded that the latter category was inapplicable, so the only issue before the court was whether the Iowa right to farm law was, on its face, a *per se* taking as a physical invasion of respondents' property. App. 14a-15a. The court concluded that it was, relying on precedents from the early twentieth century for the proposition that the authorization of a private nuisance satisfied the physical invasion test. App. 16a-24a. Based on these precedents, the court concluded that a physical taking or touching is not necessary to meet the physical invasion standard for a *per se* taking under *Lucas*. The court then held that the appropriate remedy was to hold "that portion of Iowa Code section 352.11(1)(a) that provides for immunity against nuisances unconstitutional and without any force or effect." App. 25a. Because respondents "seek no compensation," the Iowa Supreme Court struck down the law under the Federal Constitution without engaging in any analysis of what "just compensation" would be. App. 26a. The court "recognize[d] that political and economic fallout from our holding will be substantial," but concluded that "the challenged scheme is plainly—we think flagrantly—unconstitutional." *Id.*<sup>2</sup>

#### REASONS FOR GRANTING THE WRIT

One of the principal considerations governing the exercise of this Court's discretion to grant certiorari is whether a state high court "has decided an important federal question in a way that conflicts with relevant decisions of this

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<sup>2</sup> The Iowa Supreme Court concluded that the right to farm law was unconstitutional under the Fifth Amendment to the Federal Constitution and Article 1, Section 18 of the Iowa Constitution, App. 24a, which also provides that "[p]rivate property shall not be taken for public use without just compensation." Under *Michigan v. Long*, 463 U.S. 1032 (1983), the citation of the Iowa Constitution does not constitute an independent state ground precluding review in this Court of the Fifth Amendment ruling. This is particularly true since there is no dispute that the federal and Iowa takings clauses have the same meaning and scope.

Court.” S. Ct. Rule 10(c). *See, e.g., Barker v. Kansas*, 503 U.S. 594, 597 (1992); *Arizona v. Mauro*, 481 U.S. 520, 525 (1987); *Pennsylvania v. Goldhammer*, 474 U.S. 28, 28 (1985) (per curiam); *Michigan v. Clifford*, 464 U.S. 287, 289 (1984). As we explain below, the decision of the Iowa Supreme Court in this case squarely conflicts with this Court’s decisions in at least two fundamental respects. First, the decision conflicts with this Court’s precedents on when a facial takings challenge brought pursuant to the Fifth Amendment is appropriate for judicial resolution. Second, and in any event, the decision conflicts with this Court’s precedents on when a *per se* taking has been effected under the Fifth Amendment. Certiorari is warranted to resolve each of these conflicts, especially in view of the fact that the Iowa Supreme Court’s decision calls into question the constitutionality of right to farm laws found in every State of the Union.

**I. THE IOWA SUPREME COURT’S DECISION CONFLICTS WITH THIS COURT’S DECISIONS ON THE MINIMUM FACTUAL RECORD NECESSARY TO ADJUDICATE A TAKINGS CLAIM.**

This Court has “oft-repeated \* \* \* that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary.” *Hodel v. Virginia Surface Mining & Reclamation Ass’n*, 452 U.S. 264, 294-295 (1981). *See Rescue Army v. Municipal Court*, 331 U.S. 549, 570 n.34 (1947) (“If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality \* \* \* unless such adjudication is unavoidable.”) (citation omitted); *Alabama State Fed’n of Labor v. McAdory*, 325 U.S. 450, 461 (1945) (Court’s “considered practice [is] not to decide abstract, hypothetical or contingent questions \* \* \* or to decide any constitutional question in advance of the necessity for its decision \* \* \* or to decide any constitutional question except with reference

to the particular facts to which it is to be applied”) (citations omitted). “Adherence to this rule is particularly important in cases raising allegations of an unconstitutional taking.” *Virginia Surface Mining*, 452 U.S. at 295. The Iowa Supreme Court flagrantly disregarded this fundamental rule of adjudicating federal takings claims, holding the State’s right to farm law “unconstitutional and without any force or effect,” App. 25a, on a record containing absolutely no indication that the statute had been triggered, or how the statute will operate if and when it is.

In *Pennell v. City of San Jose*, 485 U.S. 1 (1988), the Court applied this rule in declining to adjudicate a facial takings challenge to a California municipality’s rent control ordinance. The ordinance authorized a local official, in assessing the reasonableness of a proposed rent increase, to consider, among other factors, whether the increase imposed an “economic and financial hardship” on the tenant. *Id.* at 4-6. A landlord and landlord association brought suit in state court, contending that the ordinance’s “tenant hardship” provision was “facially unconstitutional” under the Fifth and Fourteenth Amendments to the Constitution. *Id.* at 4 (quotation omitted).

The California Supreme Court considered the landlords’ claim and concluded that the ordinance did not violate the Fifth Amendment. This Court, however, held that it “would be premature to consider [the landlords’ facial challenge] on the present record.” *Id.* at 9. The Court explained that, “[a]s things stand, there is simply no evidence that the ‘tenant hardship clause’ has in fact ever been relied upon by a hearing officer to reduce a rent below the figure it would have been set at on the basis of the other factors set forth in the Ordinance,” and that there was “nothing in the Ordinance requiring that a hearing officer in fact reduce a proposed rent increase on grounds of tenant hardship.” *Id.* at 9-10. Emphasizing that this Court has “found it particularly important in takings cases to adhere to our admonition that ‘the con-

stitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary,” *id.* at 10 (quoting *Virginia Surface Mining*, 452 U.S. at 294-295), the Court held that “the mere fact that a hearing officer is enjoined to consider hardship to the tenant in fixing a landlord’s rent, without any showing in a particular case as to the consequences of that injunction in the ultimate determination of the rent, does not present a sufficiently concrete factual setting for the adjudication of the takings claim appellants raise here.” *Id.*<sup>3</sup>

*Pennell* thus establishes that a facial takings challenge should not be entertained where it is not clear from the record whether, when, or how the provision at issue will be applied, or what the precise impact of applying the challenged provision will be on the property rights at issue. *See also Virginia Surface Mining*, 452 U.S. at 296 & n.37 (facial takings challenge was “premature” where “appellees made no showing in the [trial court] that they own tracts of land that are affected by th[e] [challenged] provision”); *cf. Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (finding facial takings claim “ripe” where adjudication of claim did not require Court to address “the extent to which [plaintiffs] are deprived of \* \* \* their particular pieces of property or the extent to which these particular [plaintiffs] are compensated”).<sup>4</sup>

<sup>3</sup> The fact that the landlords had “specifically alleged in their complaint that [their] properties are ‘subject to the terms of’ the Ordinances” was sufficient to confer Article III *standing* on the landlords to raise their Fifth Amendment claim, but did not create an adequate record to adjudicate that claim—even though it was made in facial terms. 485 U.S. at 7 (quoting complaint).

<sup>4</sup> Lower courts have correctly interpreted *Pennell* to require an adequate factual record for the adjudication of takings claims. *See, e.g., Southern Pac. Transp. Co. v. City of Los Angeles*, 922 F.2d 498, 506 & n.9 (9th Cir. 1990) (citing *Pennell* for proposition that Supreme Court “has noted that certain facial challenges are impossible to evaluate absent some factual information regarding how the statute will be applied,” and that “some regulations, by their

Under the rule of *Pennell*, the Iowa Supreme Court should have held that respondents' facial takings claim is premature, as did the state district court below. Section 352.11(1)(a) provides a defense to nuisance actions in certain limited situations. As the Iowa Supreme Court recognized, respondents did not present any proof or even allege that petitioners' activities have created or will create a nuisance. *See* App. 5a-6a. Respondents have not filed any nuisance action, and petitioners accordingly have not had occasion to assert Section 352.11(1)(a) as a defense. The mere possibility (or even likelihood) that someone will operate a farm or conduct a farm operation in this particular agricultural area in such a manner as to create an actionable nuisance that does not fall under one of the enumerated exceptions listed in Section 352.11(1)(b), and that an aggrieved party will be unable to seek redress because of Section 352.11(1)(a), does not make respondents' facial takings challenge appropriate for judicial resolution at this time. A similar likelihood existed with respect to the tenant hardship provision challenged in *Pennell*, but the Court determined that it was "premature" to consider the landlords' claim that the provision, on its face, effected a taking. 485 U.S. at 9.

*Pennell* makes clear that a takings claim should not be evaluated unless the record is sufficiently developed to permit the court to determine the precise nature and extent of the taking alleged. As the District Court below recognized, that record is plainly absent here. *See* App. 45a-46a.

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very nature, are just not subject to facial attack on takings grounds \* \* \* [p]rior to their application"), *cert. denied*, 502 U.S. 943 (1991); *Tenoco Oil Co. v. Department of Consumer Affairs*, 876 F.2d 1013, 1026 n.18 (1st Cir. 1989) ("*Pennell* reflects the Court's continuing reluctance to treat incomplete action as a taking."); *Hammond v. Baldwin*, 866 F.2d 172, 178 (6th Cir. 1989) (citing *Pennell*, among other cases, for proposition that Supreme Court has repeated caveat that "[t]here is no injury to complain of until the state's action is 'complete'").

The importance of requiring a property owner to show with particularity the exact nature and extent of the alleged taking—even in the context of a facial challenge brought under the Fifth Amendment—cannot be overstated. As this Court has observed, “[t]he question of what constitutes a ‘taking’ for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty.” *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 123 (1978). No answer is possible, of course, unless a court knows precisely what activity constitutes the alleged taking. See *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 350-351 (1986). As the Court recognized in *Pennell*, that answer is typically not available in the absence of facts establishing how the challenged statute or ordinance has been (or is likely to be) applied. See 485 U.S. at 10-11; see also *Virginia Surface Mining*, 452 U.S. at 296 & n.37.

Even when government-sanctioned activities constitute a nuisance within the meaning of state law, there are numerous additional factors that must be taken into account in determining whether a taking has occurred within the meaning of the Fifth Amendment, including whether the challenged activities are trespassory or nontrespassory in nature, the duration and intensity of the challenged activities, and the extent to which they diminish a property owner’s use and enjoyment of property. In the absence of a record establishing such facts, judicial resolution of the constitutionality of statutes allegedly effecting a taking is premature and—as decisions like *Pennell* and *Virginia Surface Mining* establish—inappropriate.<sup>5</sup>

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<sup>5</sup> This reasoning lies at the heart of this Court’s decisions involving as-applied, regulatory takings claims. The Court has held that “a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.” *Williamson County Reg’l Planning Comm’n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). This

A factual record establishing the nature and extent of the taking alleged is indispensable for another reason. The Takings Clause provides that “private property [shall not] be taken for public use, without just compensation.” U.S. Const. amend. V, § 1, cl. 5. Thus, as this Court has recognized, the Takings Clause does not prohibit the government from condemning private property for public use; rather, it merely places a condition on the government’s power to do so by requiring it to pay “just compensation.” See *Preseault v. ICC*, 494 U.S. 1, 11 (1990); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 314 (1987). Where, as here, a State “provides an adequate procedure for seeking just compensation, [a] property owner cannot claim a violation of the [Takings Clause] until it has used the procedure and been denied just compensation.” *Williamson County Regional Planning Comm’n*, 473 U.S. at 194-195.<sup>6</sup> A court cannot determine whether a property owner has been denied just compensation, however, unless it can

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ripeness requirement is necessary because a regulatory taking occurs when a regulation has gone “too far,” and a court cannot make this determination “unless it knows how far the regulation goes.” *MacDonald*, 477 U.S. at 348.

<sup>6</sup> Thus, the Iowa Supreme Court erred in another respect. Once it determined—erroneously, for the reasons we explain in Part II, *infra*—that Section 352.11(1)(a) effected a taking, the court should have afforded the government the option of paying respondents “just compensation,” instead of declaring that the provision was unconstitutional and had no force or effect. See *First English*, 482 U.S. at 321 (once a court determines that a taking has occurred government can either amend or withdraw regulation or choose to exercise eminent domain); Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law: Substance and Procedure*, § 15.14, at 520 (2d ed. 1992) (“Once it is determined that the government regulation or action constitutes a taking for which compensation is due, the government could choose to continue the action or regulation and pay fair market value for the permanent taking of the property.”).

determine from the record the nature and extent of the taking at issue.<sup>7</sup>

In this case, the Iowa Supreme Court's failure to follow this Court's precedents—and in particular *Pennell*—led it to reach out and strike down pursuant to the Fifth Amendment a statutory provision found in each of the fifty States' right to farm laws without any factual showing whatsoever that such a decision was necessary, and without any factual basis upon which to properly evaluate the existence or extent of the taking alleged. This Court should grant certiorari to resolve the conflict between the Iowa Supreme Court's decision and this Court's own decisions on the minimum factual record necessary to adjudicate a facial takings claim under the Fifth Amendment.

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<sup>7</sup> *United States v. Causby*, 328 U.S. 256 (1946), illustrates this point. In that case, the owners of a chicken farm claimed that their property had been taken within the meaning of the Takings Clause by frequent and regular flights of military aircraft at low altitudes over their property. The chicken farmers had been forced to abandon their chicken business because the low-level flights had caused their chickens to fly into the walls from fright. The Court of Claims held that by virtue of the flights the government had taken an easement over the farmers' property. *Id.* at 258-259. On appeal, this Court agreed that the flights' interference with the chicken farmers' use of their property created an easement in the government's favor requiring the payment of just compensation. *Id.* at 267. The Court remanded the case for a determination of "just compensation" however, because a "precise description as to [the] nature" of the easement was not clear from the record. *See id.* at 267-268. The record failed to show either the frequency of the flights, the altitudes of the flights, or the type of aircraft involved to an extent that would permit the Court to determine what compensation was "just." *See id.* at 267.

**II. THIS COURT SHOULD GRANT THE PETITION TO CLARIFY THE LIMITED RANGE OF GOVERNMENTAL ACTIONS THAT CAN BE CLASSIFIED AS PHYSICAL INVASIONS AND THEREFORE PER SE TAKINGS.**

In any event, even assuming the Iowa Supreme Court properly considered respondents' facial challenge to the Iowa right to farm law, its decision holding that the statute effects a *per se* taking in violation of the Fifth Amendment is dramatically out of step with this Court's takings jurisprudence. The Iowa Supreme Court recognized that this Court has identified "two categories of state action that *must* be compensated without any further inquiry into additional factors." App. 13a (emphasis in original). As the Court explained in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), "[t]he first encompasses regulations that compel the property owner to suffer a physical 'invasion' of his property." *Id.* at 1015 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). The second *per se* taking category covers cases "where regulation denies all economically beneficial or productive use of land." *Lucas*, 505 U.S. at 1015. In these two narrow categories of cases, a compensable taking is found without further inquiry into the economic impact of, and the governmental purpose for, the regulation at issue.

In the courts below, respondents made no claim "that the challenged statute denies them all economically beneficial or productive use of their property," App. 14a, and the Iowa Supreme Court accordingly purported to "restrict [its] discussion to the physical invasion category." App. at 15a. The court briefly discussed "[t]respasory invasions of private property by government enterprise," App. at 15a-16a, but did not suggest that it viewed the existence of Iowa's right to farm law as such an invasion. The conclusion that there was no trespassory—*i.e.*, physi-

cal—invasion should have ended the court's consideration of whether the law effected a *per se* taking.

Instead, the Iowa court turned to a discussion of what it called “[n]ontrespassory invasions of private property by government enterprise.” App. 16a (emphasis added).<sup>8</sup> The court reviewed older takings cases from this Court,<sup>9</sup> from which it gleaned the conclusion that a *per se* taking could occur where there is *no* physical invasion of property and where the owner does not claim that he has been deprived of all productive use of that property. This conclusion represents an unwarranted and dramatic expansion of the *per se* taking doctrine, conflicts with this Court’s decision in *Lucas*, and is contrary to this Court’s repeated admonition that the category of cases in which a *per se* taking may be found is “very narrow.” *Loretto*, 458 U.S. at 441. See, e.g., *Yee v. City of Escondido*, 503 U.S. at 538-539; *FCC v. Florida Power Corp.*, 480 U.S. 245, 252-253 (1987); *Southview Assocs. v. Bongartz*, 980 F.2d 84, 93 (2d Cir. 1992) (*Yee* and *Florida Power* “confirm the narrow scope of so-called physical takings”), *cert. denied*, 507 U.S. 987 (1993); *Alaska Dep’t of Natural Resources v. Arctic Slope Reg’l Corp.*, 834 P.2d 134, 142

<sup>8</sup> Citing John W. Shonkwiler & Terry Morgan, *Land Use Litigation*, § 10.02(2) (1986), the court began its discussion with the observation that “[t]o constitute a *per se* taking, the government need not physically invade the surface of the land.” App. 16a. The treatise it cited, however, was not expressly referring to *per se* takings. This mistaken citation, which is in direct conflict with the teachings of *Lucas*, forms the basis for the court’s confusion throughout the remainder of its opinion between a taking and a *per se* taking.

<sup>9</sup> See App. 16a-20a (citing *United States v. Causby*, 328 U.S. 265 (1946); *Griggs v. Allegheny County*, 369 U.S. 84 (1962); *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922); *United States v. Welch*, 217 U.S. 333 (1910); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914)). The court also cited *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987), in its discussion, App. 19a. See *infra* at 20-21 (distinguishing *Nollan*).

(Alaska 1991) (“The category of *per se* takings is a narrow one”).

The vast majority of courts, both state and federal, have recognized that, where a property owner is not denied all productive use of property, it is only a *physical* invasion of the property that constitutes a *per se* taking.<sup>10</sup> A physical taking, the Court has held, occurs “only where [the government] *requires* the landowner to submit to a physical *occupation* of his land.” *Yee*, 503 U.S. at 527 (first and third emphases added). In *Loretto*, the Court explained at length why physical invasions are subjected to *per se* treatment. 458 U.S. at 435-438. In addition to the historical support for such treatment, the Court relied on its findings that: (1) “[s]uch an appropriation is perhaps the most serious form of invasion of an owner’s property interests,” destroying the ability to exercise the basic ownership rights of possession, use, and disposal, *id.* at 435-436; (2) “an owner suffers a special kind of injury when a *stranger* directly invades and occupies the owner’s property,” *id.* at 436 (emphasis in original); (3) the *per se* rule would avoid difficult line-drawing problems with respect to how much of a physical invasion there

<sup>10</sup> See, e.g., *Philip Morris, Inc. v. Harshbarger*, 159 F.3d 670, 674 (1st Cir. 1998); *Vesta Fire Ins. Co. v. Florida*, 141 F.3d 1427, 1431 (11th Cir. 1998) (government’s action not in “*per se* takings category” where “neither a physical invasion nor a denial of *all* beneficial use of ‘property’ has been shown”) (emphasis in original); *Garneau v. City of Seattle*, 147 F.3d 802, 809 (9th Cir. 1998); *Outdoor Graphics, Inc. v. City of Burlington*, 103 F.3d 690, 693-694 (8th Cir. 1996); *Texas Manufactured Housing Ass’n v. City of Nederland*, 101 F.3d 1095, 1105 n.11 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 2497 (1997); *Branch v. United States*, 69 F.3d 1571, 1576 (Fed. Cir. 1995), *cert. denied*, 117 S. Ct. 55 (1996); *Westling v. County of Mille Lacs*, 581 N.W.2d 815, 823 (Minn. 1998); *San Diego Gas & Elec. Co. v. Superior Court*, 920 P.2d 669, 698 (Cal. 1996); *Garrett v. City of Topeka*, 916 P.2d 21, 30 (Kan. 1996); *Parking Ass’n of Georgia, Inc. v. City of Atlanta*, 450 S.E.2d 200, 202 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995); *Anchorage v. Sandberg*, 861 P.2d 554, 557 (Alaska 1993).

must be to have a taking, *id.* at 436-437; and (4) “whether a permanent physical occupation has occurred presents relatively few problems of proof.” *Id.* at 437.<sup>11</sup>

These factors are not implicated by Iowa’s right to farm law. The respondents’ ability to possess, use, and dispose of their property has not been destroyed. At the very most, those interests may ultimately be somewhat impaired—to an as-yet unknown or ascertainable extent in the limited circumstances in which the statute actually affords a nuisance defense—if and when activities that would otherwise constitute a nuisance are conducted on the neighboring farmland. The imposition of such an impairment, however, is well within the legislature’s authority to “adjust[] the benefits and burdens of economic life,” *Penn Cent. Transp. Co. v. New York City*, 438 U.S. at 124, without providing compensation. Nor does the right to farm law involve the “direct[] inva[sion] and occup[ation of] the owner’s property” that concerned the Court in *Loretto*. 458 U.S. at 436. Subjecting the right to farm law to *per se* takings treatment, moreover, would generate a host of line-drawing problems as courts struggled to determine which other “nontrespassory invasions of property” should likewise share in that treatment, and would present difficult problems of proof.

While the Iowa Supreme Court paid lip service to the requirement of a physical invasion for purposes of finding a *per se* taking, App. 13a-14a, it considered none of these factors in determining that the existence of the right to farm law resulted in a *per se* taking. Instead, it surveyed cases from this Court, decided long before the advent of modern takings jurisprudence, and determined that the Court “has allowed compensation”—without any inquiry

<sup>11</sup> The *Lucas* Court offered a similar defense of application of the *per se* rule where an owner is deprived of all beneficial use by regulation short of a physical invasion. See 505 U.S. at 1017-19. As noted, no such claim was made here. App. 14a.

into the *Penn Central* factors—for “interferences short of physical taking or touching of land.” App. 18a. These pre-*Penn Central* cases, however, do not support application of the *per se* takings doctrine in the absence of physical invasion or total deprivation of use.

Certainly the decision in *United States v. Causby* does not so hold. While the Iowa Supreme Court cited *Causby* for the proposition that “[t]o constitute a *per se* taking, the government need not physically invade the surface of the land,” App. 16a, *Causby* itself characterized the government’s overflights as “a direct invasion of respondents’ domain.” 328 U.S. at 265-266. This Court has since reaffirmed that *Causby* is a physical invasion case. See *Lucas*, 505 U.S. at 1015 (*Causby* involved “physical invasions of airspace”); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 489 n.18 (1987) (citing *Causby* as a case where “interference with property can be characterized as a physical invasion by government”); *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) (*Causby* involved “physical invasion” of easement); *Penn Cent.*, 438 U.S. at 124 (same).

The Iowa Supreme Court also cited *Griggs v. Allegheny Country*, 369 U.S. 84 (1962), and *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922), in support of its view that non-physical invasions short of a wholesale denial of use could constitute *per se* takings. App. 17a. Like *Causby*, however, these cases involved physical invasions of property. See *Griggs*, 369 U.S. at 88 (overflights involve invasion of “air easement”); *Portsmouth*, 260 U.S. at 330 (government responsible for “successive trespass[es]”). This Court has in fact indicated that *Griggs* and *Portsmouth* are of a piece with *Causby*. See, e.g., *Penn Cent.*, 438 U.S. at 128.

Finally, the Iowa Supreme Court relied on *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914), to support its expansive *per se* takings theory. The court

stated that “*Richards* ‘entirely does away with the requirement of a physical taking or touching.’” App. 20a (citation omitted). Whatever else may be said of *Richards*, it seems quite evident that under modern takings jurisprudence the facts of that case would not be considered to involve a *per se* taking, but would be analyzed under the *ad hoc* factual inquiry to which most takings claims, after *Penn Central*, are subjected. Against the backdrop of this Court’s careful delineation of the narrow *per se* takings categories, *Richards*—a case which has not been cited in a majority opinion of this Court for more than half a century—should not be taken to establish a third category of *per se* takings that this Court somehow overlooked in its recent decisions.<sup>12</sup>

Thus, the cases cited by the court below fail to support its holding that the imposition of an easement—no matter what the character of the easement or the regulation—is a *per se* taking. To be sure, this Court has held that regulations involving only an easement may be eligible for *per se* treatment, but those cases are squarely within the physical invasion category of *per se* takings. In *Nolan*, the Court found that the “appropriation of a public easement across a landowner’s premises,” 483 U.S. at 831, would be considered a taking without regard to the balancing of factors that would accompany a regulatory taking because of the physical nature of the invasion: “We think that a ‘permanent physical occupation’ has occurred, for purposes of th[e] [*per se*] rule, where individuals are given a permanent and continuous right to

<sup>12</sup> The Iowa Supreme Court also cited *United States v. Welch*, 217 U.S. 333 (1910), as a “‘clear example’” of a *per se* “‘condemnation without any physical taking.’” App. 19a (quoting William B. Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 Dick. L. Rev. 207, 221 (1967)). *Welch*, however, involved the permanent destruction of an easement of passage—preventing the owners of that easement from physically passing over their right of way along the property—and should therefore be understood to involve a physical invasion.

pass to and fro, so that the real property may be continuously traversed.” *Id.* at 832. Similarly, in *Kaiser Aetna*, the Court held that “even if the Government physically invades only an easement in property, it must nonetheless pay compensation.” 444 U.S. at 180. As that language makes clear, however, it was critical that the government action at issue “will result in an actual physical invasion of the privately owned” property. *Id.* See also *Loretto*, 458 U.S. at 433 (“*Kaiser Aetna* reemphasizes that a physical invasion is a government intrusion of unusually serious character”). Nothing of the sort is at issue here. Indeed, the very fact that the Iowa Supreme Court acknowledged that it was considering a “nontrespassory invasion” should have led it to recognize that the government action was *not* a physical invasion, and that the right to farm law should therefore not have been considered to have effected a *per se* taking.<sup>13</sup>

<sup>13</sup> By definition, a trespass is “an actual physical invasion” of land. *Williamson v. Fowler Toyota, Inc.*, 956 P.2d 858, 862 (Okla. 1998); *Leaf River Forest Prods., Inc. v. Simmons*, 697 So.2d 1083, 1085 (Miss. 1996). See also *Restatement (Second) of Torts* § 158 (1965). The classic nuisance, on the other hand, involves a “nontrespassory” invasion. See, e.g., *In re Chicago Flood Litig.*, 680 N.E.2d 265, 278 (Ill. 1997); *Restatement (Second) of Torts* § 821D (1979). Thus, courts—including the Iowa courts—have long distinguished between the cause of action for trespass and for nuisance based on the need for an actual physical invasion. See, e.g., *Ryan v. City of Emmetsburg*, 4 N.W.2d 435, 438 (Iowa 1942) (“Trespass comprehends an actual physical invasion by tangible matter,” whereas “[a]n invasion, which constitutes a nuisance is usually by intangible substances, such as noises or odors”); *Leaf River Forest Prods.*, 697 So.2d at 1085 (while “trespass requires an actual physical invasion of the plaintiff’s property,” the “nuisance cause of action \* \* \* requires no actual physical invasion”); *Wilson v. Interlake Steel Co.*, 649 P.2d 922, 924 (Cal. 1982) (same). In limited circumstances, a physical invasion of property may constitute a nuisance, as well as a trespass. See, e.g., *Russo Farms, Inc. v. Vineland Bd. of Educ.*, 675 A.2d 1077, 1084 (N.J. 1996) (“the flooding of the plaintiff’s land, which is a trespass, is also a nuisance if it is repeated or of long duration”).

The holding that the “taking of easements in the neighbors’ properties,” App. 24a, by operation of the right to farm law is a *per se* taking is also inconsistent with this Court’s determinations that impairing, or even extinguishing, one “strand” in the “bundle” of property rights does not alone constitute a taking. Thus, for example, in *Andrus v. Allard*, 444 U.S. 51, 65 (1979), the Court observed that “the denial of one traditional property right”—here, respondents posit, the right to seek remedies for a nuisance in certain limited instances—“does not always amount to a taking.” Instead, “where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety.” *Id.* at 65-66. See also *Keystone Bituminous Coal Ass’n*, 480 U.S. at 497, 500-501; *Penn Cent.*, 438 U.S. at 130-131. As *Nollan* makes clear, it is only where that “strand” involves the right to exclude others from physical occupation of the property—where a physical occupation is authorized—that a *per se* taking results. 483 U.S. at 831. That is not the case here.

The decision of the Iowa Supreme Court is thus a startling departure from this Court’s takings jurisprudence. It embraces a discredited analysis under which each right associated with a particular piece of property is itself viewed as separately subject to being taken by the government. When that narrowly defined right is extinguished, therefore, a taking will always result. As this Court aptly observed long ago, however, “[g]overnment could hardly go on if, to some extent, values incident to property could not be diminished without paying for every such change in the general law,” *Pennsylvania Coal Co. v. Mahon*,

(quoting *Restatement (Second) of Torts* § 821D, cmt. e); *Colwell Sys., Inc. v. Henson*, 452 N.E.2d 889, 892 (Ill. App. Ct. 1983) (same). That possibility, however, only underscores the need for concrete facts to evaluate the *per se* takings claims raised by respondents here.

260 U.S. at 413, and this Court's takings jurisprudence has been a careful effort to avoid the paralysis of overprotection while recognizing the basic right guaranteed by the Fifth Amendment. The Iowa Supreme Court's decision threatens to upset that balance; indeed, under the reasoning of the court below, it is hard to see how common zoning ordinances—long thought to be generally insulated from takings claims, and certainly not the subject of *per se* takings claims—do not work a taking. *Cf. Agins v. City of Tiburon*, 447 U.S. 255, 261 (1980) (enactment of zoning ordinance designed to protect residents “from the ill effects of urbanization” not a taking).<sup>14</sup>

The analysis adopted by the court below is in conflict not only with the framework adopted in decisions of this Court but also with efforts by other courts to apply that framework in similar contexts. In *San Diego Gas & Electric Co. v. Superior Court*, 920 P.2d 669, 698 (Cal. 1996), for example, the California Supreme Court rejected a claim that “an intangible intrusion onto plaintiff's property” by electric and magnetic fields was a taking without regard to its economic impact. Maryland's highest court has likewise rejected efforts to expand the category of *per se* takings beyond those recognized by this Court. In *Maryland Port Admin. v. QC Corp.*, 529 A.2d 829 (Md. 1987), that court declined to find a *per se* taking where a business complained about the operation of a landfill on adjoining property, and specifically that “the ambient air over [its] property contains chrome.” *Id.* at 834. Critical to the court's conclusion was the fact that there was no

<sup>14</sup> While zoning ordinances generally prohibit certain uses of property and the right to farm law affirmatively protects certain uses, there is no constitutional distinction between the two. As the Court explained in *Lucas*, “the distinction between regulation that ‘prevents harmful use’ and that which ‘confers benefits’ is difficult, if not impossible, to discern on an objective, value-free basis; \* \* \* [and] cannot serve as a touchstone to distinguish regulatory ‘takings’—which require compensation—from regulatory deprivations that do not require compensation.” 505 U.S. at 1026.

physical invasion of the property. *Id.* at 834-838. The Second Circuit in *Southview Assocs., supra*, rejected a claim that a *per se* physical taking occurred when a landowner was denied a permit for a specific proposed development (but not all development) on the ground that the development would adversely affect a nearby deer habitat. 980 F.2d at 92-95. Under the decision of the Iowa Supreme Court below, each of these cases—and countless other similar decisions—might well have come out differently. The existence of such a conflict among the courts is yet another compelling reason for this Court to review the decision below.<sup>15</sup>

### III. THE DECISION BELOW CALLS INTO QUESTION THE CONSTITUTIONALITY OF LAWS EXISTING IN ALL FIFTY STATES AND THREATENS TO UPSET SETTLED TAKINGS JURISPRUDENCE.

The decision of the Iowa Supreme Court plainly warrants review under the standards commonly applied by this Court, for at least three reasons.

*First*, the decision holding the right to farm law unconstitutional is of critical importance because of its widespread effects on similar laws. While even the court below recognized that the decision is important in Iowa itself, *see* App. 26a (“We recognize that political and economic fallout from our holding will be substantial”), the decision necessarily calls into question the right to farm laws that exist in *all fifty States*. *See* App. 72a-73a. One recent commentator has called such laws (along with property tax relief) “by far the most ubiquitous farmland protection program in this country.” Alexander A. Reinart,

<sup>15</sup> The Iowa court's holding that the right to farm law effects a taking when it withdraws the right to bring a nuisance action is also inconsistent with the settled rule that States are free to create or eliminate causes of action and defenses thereto. *See Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) (citing cases); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432-433 (1982).

*The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. Rev. 1694, 1695 (Nov. 1998). These laws are not some recently-revived relic of idyllic, agrarian days gone by. Instead, the vast majority of the Nation's right to farm laws were adopted in the last twenty years. *Id.* at 1707. These laws thus represent the contemporaneous and unanimous judgment of the States that farming is worth preserving and protecting, and that protections—such as those from certain nuisance actions—are appropriately offered to farmers as a means of adjusting the economic burdens on and benefits to landowners in our society.

Although varying in details, the essential and underlying purpose of each State's right to farm law is the same—to give agricultural operations a reasonable and qualified defense to nuisance actions. At bottom, regardless of the exact nature of this defense in each State, all right to farm laws share the common trait of providing protection for activities that might otherwise be determined to be a nuisance. The Court below found that the law created an easement because it “allows the applicants to do acts on their own land which, were it not for the easement, would constitute a nuisance.” App. 13a. This easement, the court ruled, was a taking *per se*. Under this analysis, the right to farm laws in all fifty States constitute *per se* takings and are facially unconstitutional.

The Court has recognized that certiorari is warranted where a decision implicates the laws of many (in this case, all) States. *See, e.g., New York v. Ferber*, 458 U.S. 747, 749 & n.2 (1982) (certiorari granted when state court struck down state statute with counterparts in 19 other States); *New York v. O'Neill*, 359 U.S. 1, 3 (1959) (certiorari granted to review state court decision striking down state statute “inasmuch as this holding brings into question the constitutionality of a statute now in force in forty-two states”). The question presented here is of such gravity that the Court ought to grant the petition.

*Second*, as we have explained, the Iowa Supreme Court “has decided an important federal question in a way that conflicts with relevant decisions of this Court.” S. Ct. Rule 10(c). Over the past two decades, beginning with its seminal decision in *Penn Central*, the Court has devoted substantial effort to articulating and developing takings jurisprudence in the context of the modern regulatory state. An important part of this jurisprudence, of course, is the clarification—in *Lucas* and *Nollan* in particular—that some regulatory actions are of such a nature that no *ad hoc* balancing is necessary. As this case demonstrates, however, unless the *per se* categories are themselves carefully delimited, the incremental advances in takings jurisprudence crafted by the Court could well be jettisoned in favor of categorical rules that over-protect the rights of some property owners—at the expense of others.

The Court has also been concerned that takings challenges be entertained only on the basis of an adequate factual record, and cautioned against adjudicating such claims in the abstract. *See supra* at 9-10. The Iowa Supreme Court has cavalierly ignored these warnings, and has instead permitted the blunt instrument of a facial takings challenge to strike down a law that could in many circumstances have little or no real impact on those who claim their property interests are implicated. In addition to clarifying the *per se* takings doctrine, therefore, this case presents the Court with an opportunity to clarify the limited scope of facial challenges to laws said to work a taking.

Here, as noted, the willingness of the Iowa Supreme Court to expand the categories of *per se* takings beyond those recognized by this Court conflicts with the approach of other courts, and therefore the Court should grant the petition in this case to correct the Iowa Supreme Court’s misguided decision in this important area of federal constitutional law. In any event, takings claims by their

nature present uniquely *ad hoc* and factual disputes—or ought to—and the Court has accordingly not found it necessary to await a direct conflict before undertaking necessary clarification in this difficult area. *See Dolan v. City of Tigard*, 512 U.S. 374, 383 (1994) (certiorari granted because the Oregon Supreme Court had allegedly misapplied *Nollan*); *see also Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 1118 (1995) (“In the past, the confused nature of some of our takings case law and the fact-specific nature of takings claims has led us to grant certiorari in takings cases without the existence of a conflict.”) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari).

*Third*, the reasoning of the Iowa Supreme Court's decision also calls into question a wide variety of other laws and regulatory regimes. The threat posed by the decision below is not limited to farmers in Iowa or around the country; if it were applied to analogous situations, it could threaten other land use regulation, including environmental protection and zoning ordinances. Traditionally, these laws have withstood takings challenges—and certainly *per se* takings challenges—because local governments and state legislatures are afforded wide discretion to adjust the benefits and burdens of economic life for the greater common good. *See, e.g., Developments in the Law—Zoning*, 91 Harv. L. Rev. 1427, 1471 (1978) (“Land use regulation typically is required not because one competing use is inherently noxious, but rather because equally innocent uses inevitably conflict and demand some form of legislative resolution.”). The Iowa Supreme Court's decision will now allow takings challenges to sidestep the protection afforded by the balancing of competing interests; under its decision, any law that can be characterized as creating an easement—without any physical invasion of the property—is unconstitutional without more. This evisceration of the physical invasion standard effectively permits *per se* takings doctrine to engulf takings jurispru-

dence. This Court should grant certiorari and reverse the judgment below to make clear that the range of governmental actions that can be considered *per se* takings is far more limited than the Iowa Supreme Court understood.

Finally, we note that this case is an ideal vehicle for consideration of the question presented. As the Iowa Supreme Court observed, "the facts are not in dispute." App. 5a. The federal constitutional issue was squarely presented to and decided by the Iowa Supreme Court. There is no need to let this important question percolate in the lower courts, visiting upon other States the "fallout" that Iowa will realize from the decision below, or to await a better vehicle for resolving the question. The Court should grant certiorari.

#### CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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## **APPENDICES**



APPENDIX A

SUPREME COURT OF IOWA

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No. 96-2276

CLARENCE BORMANN and CAROLINE BORMANN, Husband  
and Wife; LEONARD MCGUIRE and CECELIA MCGUIRE,  
Husband and Wife,

*Appellants,*

v.

BOARD OF SUPERVISORS IN AND FOR KOSSUTH COUNTY,  
IOWA; and JOE RAHM, AL DUDDING, LAUREL FANTZ,  
JAMES BLACK, and DONALD MCGREGOR, In Their Ca-  
pacities as Members of the Board of Supervisors,

*Appellees,*

GERALD GIRRES, JOAN GIRRES, MIKE GIRRES, NORMA  
JEAN THUL, JERALD THILGES, SHIRLEY THILGES,  
THELMA THILGES, EDWIN THILGES, RALPH REDING,  
LORETTA REDING, BERNARD THILGES, JACOB THILGES,  
JOHN GOECKE, and PATRICIA GOECKE,

*Intervenors-Appellees.*

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Sept. 23, 1998

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LAVORATO, Justice.

In this appeal we are asked to decide whether a statu-  
tory immunity from nuisance suits results in a taking of  
private property for public use without just compensa-  
tion in violation of federal and Iowa constitutional provi-

sions. We think it does. We therefore reverse a district court ruling holding otherwise and remand. In doing so, we need not reach a second constitutional challenge.

#### I. Facts and Proceedings.

The facts are not in dispute. In September 1994, Gerald and Joan Girres applied to the Kossuth County Board of Supervisors for establishment of an "agricultural area" that would include land they owned as well as property owned by Mike Girres, Norma Jean Thul, Gerald Thilges, Shirley Thilges, Thelma Thilges, Edwin Thilges, Ralph Reding, Loretta Reding, Bernard Thilges, Jacob Thilges, John Goecke and Patricia Goecke (applicants). *See* Iowa Code § 352.6 (1993). The real property involved consisted of 960 acres. On November 10, 1994, the Board denied the application, making the following findings and conclusions:

a. The Board finds that the policy in favor of agricultural land preservation is not furthered by an Agricultural Area designation in this case as there are no present or foreseeable nonagricultural development pressures in the area for which the designation is requested.

b. The Board also finds that the Agricultural Area designation and the nuisance protections provided therein will have a direct and permanent impact on the existing and long-held private property rights of the adjacent property owners.

c. Thus, the Board concludes that the policy in favor of agricultural land preservation as set forth in Iowa Code chapter 352 is outweighed by the policy in favor of the preservation of private property rights.

d. Accordingly, the Board finds that the adoption of the Agricultural Area designation in this case is inconsistent with the purposes of Iowa Code chapter 352.

Two months later, in January 1995, the applicants tried again with more success. The Board approved the agricultural area designation by a 3-2 vote—one of which was based on the “flip [of] a nickel.” In granting the designation, the Board this time found that the application to create the agricultural area designation “complies with Iowa Code section 352.6 and that the adoption of the proposed agricultural area is consistent with the purposes of Chapter 352.”

In April 1995, several neighbors of the new agricultural area filed a writ of certiorari and declaratory judgment action in district court. The defendants were the Board and individual board members Joe Rahm, Al Dudding, Laurel Fantz, James Black, and Donald McGregor (Board).

The plaintiffs, Clarence and Caroline Bormann and Leonard and Cecelia McGuire (neighbors), challenged the Board’s action in a number of respects. The neighbors alleged the Board’s action violated their constitutionally inalienable right to protect property under the Iowa Constitution, deprived them of property without due process or just compensation under both the federal and Iowa Constitutions, denied them due process under the federal and Iowa Constitutions, ran afoul of res judicata principles, and was “arbitrary and capricious.” The applicants intervened.

Based on stipulated facts, memoranda and oral argument, the district court determined that the Board’s action was “arbitrary and capricious.” Apparently, the determination was based on one Board member voting on the basis of a flipped coin. This was the only ground on which the court ruled for the neighbors. The court rejected all of their other arguments.

Later, the neighbors filed an Iowa Rule of Civil Procedure 179(b) motion asking the court to clarify its ruling. Meanwhile, the Board corrected the “arbitrary and capri-

cious" infirmity to its November 1995 vote. The neighbors then sought, and received, a certification of appeal from this court.

## II. Scope of Review.

The neighbors sued at law and titled their petition as one for writ of certiorari and one for declaratory judgment. In the petition for writ of certiorari, the neighbors asked that a writ of certiorari issue because the Board's decision was "in excess of" the Board's "jurisdiction" and was "contrary to law" and "illegal" because the decision "violates the Fifth Amendment to the United States Constitution, and article I, section 18 of the Iowa Constitution" in that the decision "effects a taking of the [neighbors'] private property for a use that is not public." The petition asked that the decision be annulled and decreed to be void.

In the petition for declaratory relief, the neighbors sought a declaration that the Board's decision violates the "Fifth Amendment to the United States Constitution, the Fourteenth Amendment to the United States Constitution, and article I, section 18 of the Iowa Constitution."

Iowa Rule of Civil Procedure 306 authorizes the district court to issue a writ of certiorari "where an inferior tribunal, *board or officer* exercising judicial functions, is alleged to have exceeded its, or his proper jurisdiction or otherwise acted illegally." (Emphasis added.) Our scope of review is limited to sustaining a board's decision or annulling it in whole or in part. *Grant v. Fritz*, 201 N.W. 2d 188, 189 (Iowa 1972). In addition, the fact that the plaintiff has another adequate remedy does not preclude granting the writ. Iowa R. Civ. P. 308.

Thus, here, a petition for a writ of certiorari is appropriate to test the legality of the Board's decision. Our scope of review is limited to sustaining the Board's decision or annulling it in whole or in part. In addition, the fact that the neighbors may have another adequate

remedy, like declaratory judgment, does not preclude our granting relief under Rule 306.

Iowa Rule of Civil Procedure 261 (declaratory judgment) authorizes “[c]ourts of record within their respective jurisdiction [to] declare rights, status, and other legal relations whether or not further relief is or could be claimed.”

The purpose of a declaratory judgment is to determine rights in advance. *Miehls v. City of Independence*, 249 Iowa 1022, 1030, 88 N.W.2d 50, 55 (1958). The essential difference between such an action and the usual action is that no actual wrong need have been committed or loss incurred to sustain declaratory judgment relief. *Id.* at 1031, 88 N.W.2d at 55. But there must be no uncertainty that the loss will occur or that the right asserted will be invaded. *Id.* As with a writ of certiorari, the fact that the plaintiff has another adequate remedy does not preclude declaratory judgment relief where it is appropriate. Iowa R. Civ. P. 261.

We think the facts here are sufficient for us to proceed under either remedy. In addition, because the facts are not in dispute, we need not concern ourselves with whether we employ a correction-of-errors-at-law review or a de novo review. Our only question is a legal one.

### III. The Takings Challenge.

A. The parties’ contentions. The Board’s approval of the agricultural area here triggered the provisions of Iowa Code section 352.11(1)(a). More specifically, the approval gave the applicants immunity from nuisance suits. The neighbors contend that the approval with the attendant nuisance immunity results in a taking of private property without the payment of just compensation in violation of federal and state constitutional provisions.

The neighbors concede, as they must, that their challenge to section 352.11(1)(a) is a facial one because the

neighbors have presented neither allegations nor proof of nuisance. However, the neighbors strenuously argue that in a facial challenge context courts have developed certain bright line tests that spare them from this heavy burden. Specifically, the neighbors say, these bright line tests provide that a governmental action resulting in the condemnation or the imposition of certain specific property interests constitutes automatic or per se takings.

Here, the neighbors argue further, that the section 352.11(1)(a) immunity provision gives the applicants the right to create or maintain a nuisance over the neighbors' property, in effect creating an easement in favor of the applicants. The creation of the easement, the neighbors conclude, results in an automatic or per se taking under a claim of regulatory taking.

The Board and applicants respond that a per se taking occurs only when there has been a permanent physical invasion of the property or the owner has been denied all economically beneficial or productive use of the property. They insist the record reflects neither has occurred. Thus, they contend, the court must apply a balancing test enunciated in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978). They argue that under that balancing test the neighbors lose.

#### B. The relevant constitutional and statutory provisions.

1. The constitutional provisions. The Fifth Amendment to the Federal Constitution pertinently provides that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment to the Federal Constitution prohibits a state from "depriving any person of life, liberty, or property without due process of law." The Fourteenth Amendment makes the Fifth Amendment applicable to the states and their political subdivisions.

*Chicago B. & Q. R.R. v. City of Chicago*, 166 U.S. 226, 234-35, 17 S.Ct. 581, 584, 41 L.Ed. 979, 983-84 (1897).

Article I, section 9 of the Iowa Constitution pertinently provides that "no person shall be deprived of life, liberty, or property, without due process of law." Article I, section 18 of the Iowa Constitution provides:

Eminent domain—drainage ditches and levees. Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as the damages shall be assessed by a jury.

2. The statutory provisions. Iowa Code section 352.6 sets forth the procedure for obtaining an agricultural area designation. The application is to the county board of supervisors. Iowa Code § 352.6. This provision also prescribes the conditions under which a county board of supervisors may designate farmland as an agricultural area. *Id.* An agricultural area includes, among other activities, raising and storing crops, the care and feeding of livestock, the treatment or disposal of wastes resulting from livestock, and the creation of noise, odor, dust, or fumes. Iowa Code § 352.2(6).

Iowa Code section 352.11(1)(a) provides the immunity from nuisance suits:

A farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation. This paragraph shall apply to a farm operation conducted within an agricultural area for six years following the exclusion of land within an agricultural area other than by withdrawal as provided in section 352.9.

The immunity does not apply to a nuisance resulting from a violation of a federal statute, regulation, state

statute, or rule. Iowa Code § 352.11(1)(b). Nor does the immunity apply to a nuisance resulting from the negligent operation of the farm or farm operation. *Id.* Additionally, there is no immunity from suits because of an injury or damage to a person or property caused by the farm or farm operation before the creation of the agricultural area. *Id.* Finally, there is no immunity from suit "for an injury or damage sustained by the person [bringing suit] because of the pollution or change in condition of the waters of a stream, the overflowing of the person's land, or excessive soil erosion into another person's land, unless the injury or damage is caused by an act of God." *Id.*

Iowa Code section 657.1 defines nuisance and provides for civil remedies:

Whatever is injurious to health, indecent, or unreasonably offensive to the senses, or an obstruction to the free use of property, so as essentially to unreasonably interfere with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary proceedings may be brought to enjoin and abate the same and to recover damages sustained on account thereof.

Iowa Code section 657.2 is a laundry list of the conduct or conditions that are deemed to be a nuisance. Those that are relevant to nuisances resulting from farming and farm operations include:

1. The erecting, continuing, or using any building or other place for the exercise of any trade, employment, or manufacture, which, by occasioning noxious exhalations, unreasonably offensive smells, or other annoyances, becomes injurious and dangerous to the health, comfort, or property of individuals or the public.

2. The causing or suffering any offal, filth, or noisome substance to be collected or to remain in any place to the prejudice of others.

. . . .

4. The corrupting or rendering unwholesome or impure the water of any river, stream, or pond, or unlawfully diverting the same from its natural course or state, to the injury or prejudice of others.

Iowa Code § 657.2.

Our cases recognize that the statutory definition of nuisance does not “modify the common-law’s application to nuisances.” *Weinhold v. Wolff*, 555 N.W.2d 454, 459 (Iowa 1996). Rather, the statutory provisions “are skeletal in form, and [we] look to the common law to fill in the gaps.” *Id.*

There are two kinds of nuisances: public and private. We cited the differences between the two in *Guzman v. Des Moines Hotel Partners*:

A public or common nuisance is a species of catchall criminal offenses, consisting of an interference with the rights of a community at large. This may include anything from the obstruction of a highway to a public gaming house or indecent exposures. A private nuisance, on the other hand, is a civil wrong based on a disturbance of rights in land. . . . The essence of a private nuisance is an interference with the use and enjoyment of land. Examples include vibrations, blasting, destruction of crops, flooding, pollution, and disturbance of the comfort of the plaintiff, as by unpleasant odors, smoke, or dust.

489 N.W.2d 7, 10 (Iowa 1992) (citations omitted). We are dealing here with private nuisances.

To fully understand the issues we are about to discuss, we think it would aid our analysis to distinguish between

the concepts of "private nuisance" and "trespass." We made this distinction in *Ryan v. City of Emmetsburg*:

As distinguished from trespass, which is an actionable invasion of interests in the exclusive possession of land, a private nuisance is an actionable invasion of interests in the use and enjoyment of land. Trespass comprehends an actual physical invasion by tangible matter. An invasion which constitutes a nuisance is usually by intangible substances, such as noises or odors.

232 Iowa, 600, 603, 4 N.W.2d 435, 439 (1942).

In *Ryan*, we also distinguished between the concepts of "nuisance" and "negligence." Negligence is a type of liability-forming conduct, for example, a failure to act reasonably to prevent harm. *Id.* In contrast, nuisance is a liability-producing condition. *Id.* Negligence may or may not accompany a nuisance; negligence, however, is not an essential element of nuisance. *Id.* If the condition constituting the nuisance exists, the person responsible for it is liable for resulting damages to others even though the person acted reasonably to prevent or minimize the deleterious effect of the nuisance. *Id.*

C. The framework of analysis. As the neighbors point out, the federal and state constitutional provisions we set out earlier provide the following framework for a "takings" analysis: (1) Is there a constitutionally protected private property interest at stake? (2) Has this private property interest been "taken" by the government for public use? and (3) If the protected property interest has been taken, has just compensation been paid to the owner? The neighbors contend there is a constitutionally protected private right which the Board has taken from them without paying just compensation. That taking, the neighbors contend, results from the Board's approval of the agricultural area triggering the nuisance immunity in section 352.11(1)(a).

The Board and the applicants concede the neighbors have received no compensation so we need not concern ourselves with the third step of the analysis: Has just compensation been paid to the owner?

1. Is there a constitutionally protected private property interest at stake?

- a. Does the immunity provision in section 352.11(1) (a) against nuisance suits create a property right? Textually, the federal and Iowa Constitutions prohibit the government from taking property for public use without just compensation. Property for just compensation purposes means "the group of rights inhering in the citizens' relation to the physical thing, as the right to possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 378, 65 S.Ct. 357, 359, 89 L.Ed. 311, 318 (1945). In short, property for just compensation purposes includes "every sort of interest the citizen may possess." *Id.*; see also *Liddick v. Council Bluffs*, 232 Iowa 197, 221-22, 5 N.W.2d 361, 374 (1942) ("[P]roperty is not alone the corporeal thing, but consists also in certain rights therein created and sanctioned by law, of which, with respect to land, the principal ones are the rights of use and enjoyment. . . .").

State law determines what constitutes a property right. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161, 101 S.Ct. 446, 451, 66 L.Ed.2d 358, 362 (1980). Thus, in this case, Iowa law defines what is property.

The property interest at stake here is that of an easement, which is an interest in land. Over one hundred years ago, this court held that the right to maintain a nuisance is an easement. *Churchill v. Burlington Water Co.*, 94 Iowa 89, 93, 62 N.W. 646, 647 (1895). *Churchill* defines an easement as

a privilege without profit, which the owner of one neighboring tenement [has] of another, existing in respect of their several tenements, by which the servient owner is obliged to suffer, or not do something on his own land, for the advantage of the dominant owner.

*Id.*

*Churchill's* holding that the right to maintain a nuisance is an easement and its definition of an easement are consistent with the Restatement of Property:

An easement is an interest in land which entitles the owner of the easement to *use* or enjoy land in the possession of another. . . . It may entitle him to do acts which he would otherwise not be privileged to do, or it may merely entitle him to prevent the owner of the land subject to the easement from doing acts which he would otherwise be privileged to do. An easement which entitles the owner to do acts which, were it not for the easement, he would not be privileged to do, is an affirmative easement. . . . [The easement] may entitle [its] owner to do acts on his own land which, were it not for the easement, would constitute a nuisance.

Restatement of Property § 451 cmt. a, at 2911-12 (1944) (emphasis added).

Another feature of easements is that easements run with the land:

The land which is entitled to the easement or service is called a dominant tenement, and the land which is burdened with the servitude is called the servient tenement. Neither easements [n]or servitudes are personal, but they are accessory to, and run with, the land. The first with the dominant tenement, and the second with the servient tenement.

*Dawson v. McKinnon*, 226 Iowa 756, 767, 285 N.W. 258, 263 (1939).

Thus, the nuisance immunity provision in section 352.11(1)(a) creates an easement in the property affected by the nuisance (the servient tenement) in favor of the applicants' land (the dominant tenement). This is because the immunity allows the applicants to do acts on their own land which, were it not for the easement, would constitute a nuisance. For example, in their farming operations the applicants would be allowed to generate "offensive smells" on their property which without the easement would permit affected property owners to sue the applicants for nuisances. See Iowa Code § 352.2(6); see also *Buchanan v. Simplot Feeders Ltd. Partnership*, 134 Wash.2d 673, 952 P.2d 610, 615 (1998) (holding that Washington's Right-to-Farm Act gives farm quasi easement, against urban developments that subsequently locate next to farm, to continue nuisance activities) (dictum).

b. Is an easement a protected property right subject to the requirements of the just compensation clauses of the federal and Iowa Constitutions? Easements are property interests subject to the just compensation requirements of the Fifth Amendment to the Federal Constitution. *United States v. Welch*, 217 U.S. 333, 339, 30 S.Ct. 527, 527, 54 L.Ed 787, 788 (1910). Easements are also property interests subject to the just compensation requirements of our own Constitution. *Simkins v. City of Davenport*, 232 N.W.2d 561, 566 (Iowa 1975).

c. Has the easement resulted in a taking?

(1) Takings jurisprudence, generally. There are two categories of state action that *must* be compensated without any further inquiry into additional factors, such as the economic impact of the governmental conduct on the landowner or whether the regulation substantially advances a legitimate state interest. The two categories include regu-

lations that (1) involve a permanent physical invasion of the property or (2) deny the owner all economically beneficial or productive use of the land. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). These two categories are what the neighbors term “per se” takings. The per se rule regarding the first category—physical invasion—was firmly established in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425, 102 S.Ct. 3164, 3171, 78 L.Ed.2d 868, 886 (1982).

Presumably, in all other cases involving “regulatory takings” challenges, the United States Supreme Court engages in a case-by-case examination in determining at which point the exercise of the police power becomes a taking. *Id.* This ad hoc approach calls for a balancing test that is essentially one of reasonableness. The test focuses on three factors: (1) the economic impact of the regulation on the claimant’s property; (2) the regulation’s interference with investment-backed expectations; and (3) the character of the governmental action. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124, 98 S.Ct. 2646, 2659, 57 L.Ed.2d 631, 648 (1978). According to some commentators, a court must first find that the regulation substantially advances legitimate state interests before the court may test the regulation against the three factors in *Penn Central*. See, e.g., Craig A. Peterson, *Land Use Regulatory “Takings” Revisited: The New Supreme Court Approaches*, 39 *Hastings L.J.* 335, 351 (1988).

(2) Physical invasion. The Board and applicants contend the neighbors’ argument fails under both categories of per se takings: physical invasion and denial of all economically beneficial or productive use of the property. The neighbors do not contend the record supports a finding that the challenged statute denies them all economically beneficial or productive use of their property.

Accordingly, we restrict our discussion to the physical invasion category.

According to one commentator.

[t]he term "regulatory taking" refers to situations in which the government exercises its "police powers" to restrict the use of land or other forms of property. This is often accomplished through implementation of land use planning, zoning and building codes. In contrast, a governmental entity exercises its eminent domain power or acts in an "enterprise capacity, where it takes unto itself private resources and uses them for the common good." Where the private landowner will not sell the land, the government entity seeks condemnation of the property and pays a fair purchase price to be determined in court. On the other hand, an inverse condemnation claim is sought by a landowner when the government fails to seek a condemnation action in court.

John W. Shonkwiler & Terry Morgan, *Land Use Litigation* § 1.02, at 6 (1986) [hereinafter Shonkwiler]. The neighbors' challenge here is one of inverse condemnation.

We think it would aid our analysis of the neighbors' takings argument to discuss those cases where a government entity acting in its enterprise capacity has appropriated private property without first exercising its eminent domain power.

(a) Trespassory invasions of private property by government enterprise. Generally, when the government has physically invaded property in carrying out a public project and has not compensated the landowner, the United States Supreme Court will find that a per se taking has occurred. See *Shonkwiler* § 10.01(a) at 369. For example, in *Pumpelly v. Green Bay & Mississippi Canal Co.*, the Court held there was a taking where the defendant's construction of a dam, pursuant to state authority,

permanently flooded the plaintiff's property. 13 Wall. 166, 80 U.S. 166, 181, 20 L.Ed. 557, 561 (1871). In so holding, the Court enunciated the following rule:

[W]here real estate is actually invaded by super-induced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the constitution.

*Id.*

In a more recent case, the Court applied the same rule to a state law that authorized third parties to physically intrude upon private property. *Loretto*, 458 U.S. at 432 n. 9, 102 S.Ct. at 3174 n. 9, 73 L.Ed.2d at 880 n. 9 (holding that a New York statute requiring the owners of apartment buildings to permit cable television operators to install transmission facilities on their property was in violation of the Just Compensation Clause).

(b) Nontrespassory invasions of private property by government enterprise. To constitute a per se taking, the government need not physically invade the surface of the land. See Shonkwiler § 10.02(2), at 370. For example, in *United States v. Causby*, the Court held that the frequent and regular flights of government planes over the plaintiffs' land had created an easement in the lands for the benefit of the government. 328 U.S. 256, 266-67, 66 S.Ct. 1062, 1068, 90 L.Ed. 1206, 1213 (1946). The plaintiffs owned a small chicken farm near an airport leased by the government for use by army and navy aircraft. The glide path of one of the runways passed right over the plaintiffs' land at a height of only eighty-three feet. As a result of the aircraft's noise, the plaintiffs had to abandon their commercial chicken operation. *Id.*

The Court held that the flights' interference with the use of the plaintiffs' land constituted a taking of a flight easement that had to be compensated on the basis of

diminution in the land's value resulting from the easement. *Id.* at 261-62, 66 S.Ct. at 1066, 90 L.Ed. at 1210. In the course of its opinion, the Court stated:

[T]he flight of airplanes, which skim the surface but do not touch it, is as much an appropriation of the use of the land as a more conventional entry upon it. . . . The reason is that there [is] an intrusion so immediate and direct as to subtract from the owner's full enjoyment of the property and to limit his exploitation of it. . . . The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it affect the use of the surface of the land itself. We think the landowner, as an incident to his ownership, has a claim to it and invasions of it are in the same category as invasions of the surface. . . . Flights over private land are not a taking, unless they are so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land. We need not speculate on that phase of the present case. For the findings of the Court of Claims plainly establish that there was a diminution in value of the property and that the frequent, low-level flights were the direct and immediate cause. We agree with the Court of Claims that a servitude has been imposed upon the land.

*Id.* at 265-67, 66 S.Ct. at 1067-68, 90 L.Ed. at 1212-13; accord *Griggs v. Allegheny County*, 369 U.S. 84, 89, 82 S.Ct. 531, 533-34, 7 L.Ed.2d 585, 588-89 (1962); see also *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287 (1922) (holding that firing, and imminent threat of firing, of navy coastal guns over plaintiff's property imposed a "servitude" upon the plaintiff's land and thus amounted to a taking of some interest for public use); *Dolezal v. City of Cedar Rapids*, 209 N.W.2d 84, 87 (Iowa 1973) (recognizing a navigation easement as one that permits free flights over land including those so low and so frequent

as to amount to a taking of property); 2A Philip Nichols, *Eminent Domain* § 6.06, at 6-92 (3d rev. ed. 1998) (“Physical invasions of property are not limited to human or even vehicular entry. To the contrary, the majority of cases involve the transmission of smoke, dust, earth, water, sewage or some other agent onto the impacted property. Regardless of the agent, the result of the invasion may be diminution in values of the property, partial or complete (and permanent and temporary) appropriation, or complete destruction.”) [hereinafter Nichols].

In *Fitzgerald v. City of Iowa City*, 492 N.W.2d 659, 663 (Iowa 1992), we had occasion to consider a physical invasion claim involving overflying aircraft. As in *Causby*, the plaintiffs in *Fitzgerald* claimed the overflying aircraft so adversely affected the use and enjoyment of their property that a taking had resulted. We rejected the claim because the plaintiffs had failed to prove a “measurable decrease in market value” due to the overflying aircraft. *Id.* at 665. Nevertheless, we cited *Causby* for the proposition that “[i]n some circumstances, overflying aircraft may amount to a physical invasion.” *Id.* We recognized that when interferences with property from overflying aircraft result in a measurable decrease in property market value, a taking has occurred. *Id.* at 663. In such cases, we said “the right to recovery is not for the nuisance that must be endured but for the loss of value that has resulted.” *Id.* The loss-in-value measure of damages is what we would ordinarily use in eminent domain cases. *Id.* As mentioned, *Causby* used this same measure of damages.

The United States Supreme Court has allowed compensation for other kinds of interferences short of physical taking or touching of land. See William B. Stoebuck, *Condemnation by Nuisance: The Airport Cases in Retrospect and Prospect*, 71 Dick. L.Rev. 207, 220-21 (1967) [hereinafter Stoebuck]. For example, in *United States v. Welch*, the plaintiff had a passage easement over a neighbor’s property. 217 U.S. 333, 339, 30 S.Ct. 527, 527,

54 L.Ed. 787, 789-90 (1910). The passage was the plaintiff's only access to a county road. The government flooded the neighbor's property thereby cutting off the plaintiff's only access to the road. The Court held the plaintiff was entitled to compensation for the easement. *Id.* at 339; 30 S.Ct. at 527, 54 L.Ed. at 789-90. Because the benefited land—plaintiff's property—was not physically touched, this case is "a clear example of condemnation without any physical taking." Stoebuck, at 221; *see Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831, 107 S.Ct. 3141, 3143, 97 L.Ed.2d 677, 687 (1987) (holding that requiring property owner to give easement of access across his property to obtain a building permit was a physical taking of private property that required compensation).

In *Pennsylvania Coal Co. v. Mahon*, a state statute prohibited coal mining if it were done in a manner to cause subsidence of any dwelling. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322 (1922). The plaintiff had a contract to mine coal under a dwelling but the statute prevented the plaintiff from doing so. *Id.* The Court held the statute was an attempt to condemn property—the right to mine coal—without compensation. *Id.* at 414, 43 S.Ct. at 159-60, 67 L.Ed. at 326. *Mahon* "is a situation in which, by denying an owner the occupancy and use of his property interest, the government takes the interest without any semblance of physical intrusion." Stoebuck, at 221.

*Richards v. Washington Terminal Co.* presents a factual scenario closer to the facts in this case. 233 U.S. 546, 34 S.Ct. 654, 58 L.Ed. 1088 (1914). In *Richards*, the plaintiff owned residential property along the tracks of a railroad that had the power of eminent domain. The property lay near the mouth of a tunnel. The Court recognized that two kinds of the railroad's activities had partially destroyed the plaintiff's interest in the enjoyment of his property. The first kind involved smoke, dust,

cinders, and vibrations invading the plaintiff's property at all points at which the property abutted the tracks. The second kind involved gases and smoke emitted from engines in the tunnel that contaminated the air and invaded the plaintiff's property. A fanning system inside the tunnel forced the emission of the gases and smoke from the tunnel. As to the first activity, the Court denied compensation because it was the kind of harm normally incident to railroading operations. *Id.* at 554-55, 34 S.Ct. at 657-58, 58 L.Ed. at 1091-92. As to the second activity—gases and smoke from the tunnel—the Court concluded the plaintiff was entitled to compensation for the “special and peculiar damage” resulting in diminution of the value of the plaintiff's property. *Id.* at 557, 34 S.Ct. at 658, 58 L.Ed. at 1093.

*Richards* is viewed as recognizing the taking of a property interest or right “to be free from ‘special and peculiar’ governmental interference with enjoyment.” *Stoeck*, at 220. The taking involved “no kind of physical taking or touching—none whatever.” *Id.* Viewed in this light, *Richards* “entirely does away with the requirement of a physical taking or touching.” *Id.*; see *Nichols* § 6.01, at 6-9 n. 11 (“It is not necessary, in order to render a statute obnoxious to the restraint of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or thing itself, so long as it affects its free use and enjoyment. . .”).

(c) Liability of government for a taking by the operation of a nuisance-producing governmental enterprise. With regard to private nuisances,

[t]he power of the legislature to control and regulate nuisances is not without restriction, and it must be exercised within constitutional limitations. The power cannot be exercised arbitrarily, or oppressively, or unreasonably. . . . It has been broadly stated, as an additional limitation to the power of the legislature, that . . . the legislature may not authorize

the use of property in such a manner as unreasonably and arbitrarily to infringe on the rights of others, as by the creation of a nuisance. So it has been held that the legislature has no power to authorize the maintenance of a nuisance injurious to private property without due compensation.

66 C.J.S. *Nuisances* § 7, at 738 (1950).

Thus, the state cannot regulate property so as to insulate the users from potential private nuisance claims without providing just compensation to persons injured by the nuisance. The Supreme Court firmly established this principle in *Richards*, holding that “while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking.” *Richards*, 233 U.S. at 553, 34 S.Ct. at 657, 58 L.Ed. at 1091; *see also Pennsylvania R.R. v. Angel*, 41 N.J. Eq. 316, 7 A. 432, 433 (1886) (“[A]n act of the legislature cannot confer upon individuals or private corporations, acting primarily for their own profit, although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners.”).

A number of state courts have decided takings cases on the basis that the government entity operated a nuisance-producing enterprise. *See, e.g., Thornburg v. Port of Portland*, 233 Or. 178, 376 P.2d 100, 106 (1962) (“[A] taking occurs whenever government acts in such a way as substantially to deprive an owner of the useful possession of that which he owns, either by repeated trespasses or by repeated nontrespassory invasions called ‘nuisance.’”). Significantly, a large number of these cases deal with smoke and odors from sewage disposal plants and city dumps. One commentator describes the cases this way:

Typically, a city sewage plant or dump in the vicinity of, but not necessarily directly adjacent to, the plain-

tiff's land has wafted its noxious smoke, odors, dust, or ashes, usually combinations of these, over the plaintiff's land, with the obvious result of lessening its enjoyment. No physical touching is present, nor do the courts try to equate the municipal acts with touchings. [Several states] have allowed eminent domain compensation in cases of this kind. . . . More significant than a court's language is the result it announces, and in this respect all the decisions stand for the proposition that nuisance-type activities are a taking. . . .

Stoebuck, at 226-27; *see also Nichols* § 6.07, at 6-112 to 6-113 ("[G]eneration of offensive odors, gases, smoke . . . may constitute a taking.").

The commentator ascribes a name to the theory of these cases: condemnation by nuisance. Stoebuck, at 226. And the commentator has formulated the theory this way: "governmental activity by an entity having the power of eminent domain, which activity constitutes a nuisance according to the law of torts, is a taking of property for public use, even though such activity may be authorized by legislation." *Id.* at 208-09; *see also City of Georgetown v. Ammerman*, 143 Ky. 209, 136 S.W. 202, 202 (1911) (holding that odors from city dump adjacent to plaintiff's property created a nuisance that was a taking of the property); *Ivester v. City of Winston-Salem*, 215 N.C. 1, 1 S.E.2d 88, 88-90 (1939) (holding as part of fundamental law of North Carolina that odors from disposal plant next to plaintiff's property constituted nuisance and were a taking; North Carolina has no constitutional provision for a "taking"); *Brewster v. City of Forney*, 223 S.W. 175, 178 (Tex. Com.Ct.App.1920) (holding under Texas Constitution that odors from a nearby sewage disposal plant resulted in a taking of plaintiff's property); *Nichols* § 6.07, at 6-112 (stating under broad view of property—right to use, exclude, and dispose—there need not be a physical taking of the property or even dispossession; any substantial interference

with the elemental rights growing out of property ownership is considered a taking).

One court long ago anticipated the so-called condemnation by nuisance theory this way:

Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that it cannot be occupied in comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense.

*Pennsylvania R.R. v. Angel*, 7 A. at 433-34.

Our own definition of a taking is in accord with this concept:

[A] "taking" does not necessarily mean the appropriation of the fee. It may be anything which substantially deprives one of the use and enjoyment of his property or a portion thereof.

*Phelps v. Board of Supervisors of County of Muscatine*, 211 N.W.2d 274, 276 (Iowa 1973) (holding that construction of a bridge and causeway over river in such a manner as to allegedly cause greater flooding on adjacent property than previously was a "taking" within the meaning of the Iowa Constitution).

As mentioned, the Board's approval of the applicants' application for an agricultural area triggered the provisions of section 352.11(1)(a). The approval gave the applicants immunity from nuisance suits. (Significantly, section 352.2(6) allows an agricultural area to include activities such as the creation of noise, odor, dust, or

fumes.) This immunity resulted in the Board's taking of easements in the neighbors' properties for the benefit of the applicants. The easements entitle the applicants to do acts on their property, which, were it not for the easement, would constitute a nuisance. This amounts to a taking of private property for public use without the payment of just compensation in violation of the Fifth Amendment to the Federal Constitution. This also amounts to a taking of private property for public use in violation of article I, section 18 of the Iowa Constitution.

In enacting section 352.11(1)(a), the legislature has exceeded its authority. It has exceeded its authority by authorizing the use of property in such a way as to infringe on the rights of others by allowing the creation of a nuisance without the payment of just compensation. The authorization is in violation of the Fifth Amendment to the Federal Constitution and article I, section 18 of the Iowa Constitution.

The district court erred in concluding otherwise.

D. The remedy. In *Agins v. Tiburon*, the California Supreme Court held that when legislation results in a taking, the landowner's remedy is to seek a declaratory judgment action that the legislation is invalid because it makes no provision for payment of just compensation. 157 Cal. Rptr. 372, 598 P.2d 25, 28 (Cal.1979); see 1 Nichols, *Eminent Domain* § 1.42(1), at 1-157 (3d rev. ed.1997). The court, however, refused for policy reasons to allow the landowner to sue in inverse condemnation for temporary takings damages. Temporary takings damages represent the damages the landowner suffers up to the time the court declares a statute invalid because it violates constitutional provisions for payment of just compensation. This was the holding in *Agins* under both the federal and state just compensation clauses. *Id.*; see 26 Am.Jur.2d *Eminent Domain* § 137 (1996) ("The constitutional requirement of just compensation may not be evaded or

impaired by any form of legislation, and statutes which conflict with the right to just compensation will generally be declared invalid.”).

Later, the United States Supreme Court had occasion to review the California rule in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California*, 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). The Court held that invalidation of the offending legislation without compensation for the taking is a constitutionally insufficient remedy for a taking under the Federal Just Compensation Clause. In addition to invalidation, the landowner is entitled to takings damages (temporary taking) that occurred before the ultimate invalidation of the challenged legislation. *Id.* at 319-21, 107 S.Ct. 2388-89, 96 L.Ed.2d at 266-68.

Here the neighbors seek no compensation. Rather, they seek only invalidation of that portion of section 352.11(1)(a) that provides immunity against nuisance suits. We therefore need not concern ourselves with damages for any temporary taking. Accordingly, we hold unconstitutional and invalidate that portion of section 352.11(1)(a) that provides for immunity against nuisance suits. We reach this result under the Fifth Amendment to the Federal Constitution and also under article I, section 18 of the Iowa Constitution.

We reverse and remand for an order declaring that portion of Iowa Code section 352.11(1)(a) that provides for immunity against nuisances unconstitutional and without any force or effect.

We reach this holding with a full recognition of the deference we owe to the General Assembly. That branch of government—with some participation by the executive branch—holds the responsibility to sort through the practical realities and, through the political process, reach consensus in highly controversial public decisions. Those deci-

sions demand our sincere respect. The rule is therefore that "[a] challenger must show beyond a reasonable doubt that the statute violates the constitution and must negate every reasonable basis that might support the statute." *Johnston v. Veterans' Plaza Authority*, 535 N.W.2d 131, 132 (Iowa 1995). The rule finding constitutionality in close cases cannot control the present one, however, because, with all respect, this is not a close case. When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few. In short, it appropriates valuable private property interests and awards them to strangers.

The same public that constituted the other branches of state government to make political decisions with an eye on economic consequences expects the court to resolve constitutional challenges on a purely legal basis. We recognize that political and economic fallout from our holding will be substantial. But we are convinced our responsibility is clear because the challenged scheme is plainly—we think flagrantly—unconstitutional.

REVERSED AND REMANDED.

All justices concur except LARSON and ANDREASEN, JJ., who take no part.

APPENDIX B

[Filed Jul. 31, 1996]

IN THE IOWA DISTRICT COURT  
FOR KOSSUTH COUNTY

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CLARENCE BORMANN and CAROLINE BORMANN, Husband  
and Wife; LEONARD McGUIRE and CECELIA McGUIRE,  
Husband and Wife,

*Plaintiffs,*

-vs-

THE BOARD OF SUPERVISORS in and for KOSSUTH COUNTY  
IOWA, and JOE RAHM, AL DUDDING, LAUREL FANTZ,  
JAMES BLACK and DONALD MCGREGOR, In Their Ca-  
pacities as Members of the Board of Supervisors,  
*Defendants.*

GERALD GIRRES, JOAN GIRRES, MIKE GIRRES, NORMAN  
JEAN THUL, GERALD THILGES, SHIRLEY THILGES,  
THELMA THILGES, EDWIN REDING, RALPH REDING,  
LORETTA REDING, BERNARD THILGES, JACOB THILGES,  
JOHN GOECKE and PATRICIA GOECKE,

*Intervenors.*

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FINDINGS, CONCLUSIONS AND JUDGMENT

On the 1st day of April, 1996, the above-captioned pro-  
ceeding came to the Court's attention pursuant to prior  
Order. The Plaintiffs appeared by counsel of record,  
Michael Gabor, the Defendants appeared by counsel of  
record, David Skilling, Kossuth County Attorney, and the  
intervenors appeared by counsel of record, Eldon McAfee.  
The Plaintiffs and Defendants had previously executed  
and filed a written Stipulation of Facts, and the Defend-  
ants had previously made their return of the Writ of

Certiorari, which return and its attachments constitute the record herein. Accordingly, no evidence was received, and this matter was deemed submitted upon the record oral arguments of counsel. The Court has now had an opportunity to examine the factual stipulation, the documents returned with the writ, has had the benefit of the briefs and arguments of the parties, has conducted its own research, and deems itself fully advised and makes the following Findings of Fact, Conclusions and enters the following Judgment.

#### *STATEMENT OF THE CASE*

This case is pled in two counts. Count I is a certiorari proceeding and Count II seeks a corresponding declaratory judgment. The Plaintiffs contend and the Defendants and Intervenor deny that the Defendant, Kossuth County Board of Supervisors, acted illegally in approving, on March 30, 1995, the establishment of an "agricultural area" for certain real property owned by the Intervenor in Riverdale Township, Kossuth County, Iowa. Facts necessary to understand the issues before the Court will be stated next below.

#### *FACTS*

The parties' stipulated statement of fact filed August 22, 1995 is herein incorporated by this reference and will not be repeated. For present purposes it is enough to note that in September, 1994 Gerald and Joan Girres made application for the establishment of an agricultural area in Riverdale Township which included land owned by them and by Mike Girres, Joan Thul, Norman Thul, Gerald Thilges and Shirley Thilges, Thelma Thilges and Edwin Thilges, Ralph Reding and Loretta Reding, Bernard Thilges, Jacob Thilges, John Goecke and Patricia Goecke. The real property involved consisted of 960 acres in Sections 17, 20, 21 and 22 in the said township. Following proper published notice, a hearing was had

before the Defendant Board on November 10, 1994 at which the Board denied the application, finding there were no present or foreseeable non-agricultural development pressures in the area, that the nuisance protections provided by the agricultural area designation would have a direct and permanent impact on the existing and long-held property rights of adjacent property owners and that the policy in favor of agricultural land preservation was outweighed by the policy in favor of the preservation of private property rights.

Thereafter on January 30, 1995, a modified proposal was placed before the board, and on March 14, 1995 was again heard, after proper notice, by the defendant board. On March 30, 1995, in regular session, the defendant board on a 3 to 2 affirmative vote, approved the agricultural area designation.

The transcript of the March 30, 1995 meeting discloses that Supervisor Fantz cast an affirmative vote because: "Um, I guess I feel that the agricultural area law, I really don't like it but it doesn't look like the legislators are going to be doing anything with the law this session. And so for now, I believe that if any of the applicants have followed all the rules and regulations and requirements that an ag area should be granted and I would like to give an example. If a 16 year old goes in to get a driver's license you may not think that he is going to be a responsible driver or you may not like the law, you might think that 16 year olds shouldn't even be allowed to drive, but that 16 year old if they have complied with all the regulations, you would give him a license. And I feel that these people have fulfilled all the legal requirements so therefore I guess I would move that the agricultural area be granted."

The same transcript discloses that Supervisor Dudding cast an affirmative vote because "my decision is based upon the fact that I have had a lot of time to pick up pros and cons on this thing and would you believe the pros and

cons were tied so I flipped a nickel this morning and that is the way I came up with the answers.”

Thereafter, a resolution of the Board approving the agricultural area was, as required by statute, recorded in the office of the Kossuth County Recorder.

On April 11, 1995, the Plaintiffs filed their petition for writ of certiorari and for declaratory judgment, challenging the validity of the State statute authorizing creation of the agricultural area, on certain constitutional and common law grounds to be discussed later, seeking a judgment of this Court declaring the board’s approval void.

### CONCLUSIONS OF LAW INTRODUCTION

At least since the 1970’s increasing public concern has arisen that “America is losing its farm land.” Note, *Chapter 93A Right-To-Farm-Protection-For-Iowa*, 35 Drake Law Review, 633 (1985-86). Both State and local governments have adopted a variety of protective measures to minimize the conversion of agricultural land to non-agricultural uses. *Id.* at 634. A legislative response to this perceived problem in Iowa was the Iowa Land Preservation and Use Act. Chapter 93A, Code of Iowa (1985), is now Chapter 352, Code of Iowa (1995). The act as originally adopted provided only for a state land preservation policy. Agricultural areas were not mentioned. 1977 Iowa Acts, 67th General Assembly, Chapter 53, approved June 30, 1977. The act provided for a period of study at both the State and County level, and appears to have resulted in the original version of the present statute. As enacted, two distinct themes are present in this chapter. One is the development and implementation in each county of a land preservation plan and the other is the creation of agricultural areas, defined in Section 3(1) of the act, which regulates land uses within such areas, and provides certain protections as will be noted below. 1982

Iowa Acts, 69th General Assembly, Chapter 1245, approved May 14, 1982.

The legislative findings supporting the latter enactment are expressed in Section 2 of the act, (now Section 352.1, Code of Iowa (1995)). It is recited to be the intent of the General Assembly to provide for the orderly use and development of land and related natural resources in Iowa. The section also recognizes the prominence of agriculture as a major economic activity in Iowa and states that establishment of agricultural areas is so that land inside these areas may be conserved for the production of food, fiber and livestock, "thus assuring the preservation of agriculture as a major factor in the economy of this State."

A prominent legal commentator on agricultural law issues has written:

The tension between livestock production in the U.S. and the advocacy of land use controls, environmental regulations, and nuisance laws has grown in recent years. While new research developments may some day help reduce environmental concerns, several factors may make the issue even more significant in the near future. (Research example omitted.)

Changes under way in the structure of the livestock industry increase the potential for conflict between agriculture and non-farmland uses. Increased public awareness and attention to environmental concerns will place new demands on agriculture to insure animal wastes do not pollute air or water. Local governments are being urged to use land use ordinances to control the location of new livestock facilities. As more non-farm people move into rural areas, the potential for nuisance suits over the effects of farming practices will increase. Neal D. Hamilton, *Nuisance, Land Use Control and Environmental Law*, at 405 (Drake University Agricultural Law Center, 1992).

Justice Schultz has previously stated the precise issue more succinctly: "In this appeal we learn that the utopia of country living can be frustrated by modern farming practices." *Valasek v. Bayer*, 401 NW(2) 33 (Iowa 1987).

In this case, the specific portion of Chapter 352 which is drawn into question is Section 352.11 which provides "incentives for agricultural land preservation-payment of costs and fees in nuisance actions", in the following language:

"1. Nuisance restriction. (a) A farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activity of the farm or farm operation. This paragraph shall apply to a farm operation conducted within an agricultural area for six years following the exclusion of land within an agricultural area other than by withdrawal as provided in Section 352.9."

Subsequent subsections provide that the foregoing blanket protection is inapplicable if the nuisance results from an operation conducted in violation of a Federal or State statute or rule, or from "negligent" operation of the farm or farm operation. Subsequent legislation has further provided that a nuisance suit may not be brought until a mediation release is secured under Chapter 654B, and that if a defendant is a prevailing party, the defendant may be awarded attorney fees and costs if the court determines the plaintiff's claim was "frivolous". 1993 Iowa Acts, 75th General Assembly, Chapter 1246, approved May 20, 1993.

The foregoing statutory provision has substantially, although not completely, abrogated one's right to bring a common law nuisance action seeking damages or injunctive relief to abate conditions occurring upon a farm located within a designated agricultural area. The legis-

lative findings and statutory history amply demonstrate a strong and compelling public interest in preserving both agricultural land in general and the quality of the State's agricultural economy in particular. The question before the Court is whether the means adopted by the legislature to so do are consistent with the constitution. Additional claims made by the Plaintiffs are that the Defendant Board acted illegally in adopting the resolution approving the ag area in question here. The specific constitutional claims of the Plaintiffs are:

1. That the statute is violative of Article I, Section I of the Iowa Constitution because it abrogates a common law right to maintain a private nuisance action.
2. That the statute constitutes a "taking" for a non-public use, that is to say, for the benefit of the private farmland owners within the agricultural area.
3. That the statute operates as an exercise of eminent domain without just compensation.
4. That the statute operates as a regulatory taking without just compensation.
5. That the statute operates as a deprivation of property without procedural due process.

The Plaintiffs further claim that there was error or infirmity in the Board action of March 30, 1995, approving the ag area designation, in that: (1) The March approval is barred by the November, 1994 decision to disapprove a substantially similar agricultural area as *res judicata*. (2) The opinion was arbitrary and capricious and therefore illegal. (3) The approval was effected by a legal error, that is, at least one board member believed (contrary to law) that the Board had no discretion to disapprove (and was therefore compelled to approve) the proposed ag area designation.

Each of these contentions will be addressed in turn below.

Before proceeding to address the contentions of the parties, it is appropriate to note that the Plaintiffs' cause of action is stated in two counts. Count one is a certiorari proceeding alleging the constitutional and statutory infirmities noted above, and count two is a declaratory judgment act seeking the same relief. Where violations of basic constitutional safeguards are involved, it is the duty of the Court to make its own evaluation of the facts from the totality of the circumstances. *Hancock v. City Council of Davenport*, 392 NW(2) 472 (Iowa 1986). Illegality of the board's proceedings would be established if the board has acted in violation of a constitutional provision or has not acted in accordance with law. *Id.* The fact that the Plaintiffs have chosen both certiorari and a declaratory judgment proceeding do not change the standard of review nor convert it to an equitable proceeding. The role of this Court is limited to determining whether the inferior tribunal, board or officer, exceeded its proper jurisdiction or otherwise acted illegally. If it is found that the statute implemented by the Board in this case is unconstitutional then illegality will be established.

#### STANDARD OF REVIEW

It is also worthy of note that the Plaintiffs are making a facial challenge to Section 352.11. It is not alleged that any of the Intervenor are at this time maintaining a nuisance upon their premises, and under these circumstances, the Plaintiffs have assumed a particularly heavy burden. In a similar circumstance the U.S. Supreme Court has said:

Because appellee's taking claim arose in the context of a facial challenge, it presented no concrete controversy concerning whether application of the Act to particular surface mining operations or its effect upon specific parcels of land. Thus, the only issue properly before the district court and, in turn, this court, is whether the "mere enactment" of the

Surface Mining Act constitutes a taking. (citation omitted). The test to be applied in considering this facial challenge is fairly straightforward. A statute regulating the uses that can be made of property effects a taking if it "denies an owner economically viable use of his land. . . ." *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 69 L.Ed.2d 1, 101 S.Ct. 2352 (1981).

Plaintiffs in such a position have been said to face "an uphill battle." *Christensen v. Yolo County Bd. of Supervisors*, 995 F.2d 161 (9th Cir. 1993).

The standard for showing that a zoning restriction is facially invalid is "very high." *Carpenter v. Tahoe Regional Planning Agency*, 804 F.Supp. 1316 (D. Nev. 1992).

The most frequently cited case for the foregoing propositions is *Agin v. City of Tiburon*, 447 U.S. 255, 65 L.Ed.2d 106, S.Ct. 2138 (1980), where the court said: "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." 447 U.S. at 260.

The statute challenged in this case, as noted above, substantially restricts the rights of adjoining land owners to prosecute a cause of action for the maintenance of a private nuisance against persons operating a farm within the defined agricultural area. It is worthy first to examine the nature of a nuisance cause of action in order to fully understand what the Plaintiffs claim to have been abrogated.

Although Chapter 657 statutorily defines nuisances to include "whatever is . . . offensive to the senses, or an obstruction to the free use of property, so as essentially to interfere with the comfortable enjoyment of life or property, is a nuisance, and a civil action by ordinary

proceedings may be brought to enjoin and abate the same and to recover damages sustained on account thereof." These statutory definitions do not modify the common law rule applicable to nuisances. "Another well established rule is that one must use his own property so that his neighbor's comfortable and reasonable use and enjoyment of his estate will not be unreasonably interfered with or disturbed. *Schlotefelt v. Vinton Farmers' Supply Co.*, 252 Iowa 1102, 1107-08, 109 NW2d 695 (1961). The essential test is said to be the "reasonableness of conducting it (the operation involved) in the manner, at the place and under the circumstances in question." *Ritter v. Keokuk Electro-Metals Co.*, 248 Iowa 710, 82 NW2d 151 (1957).

Our Supreme Court has recognized a distinction between a trespass and a private nuisance. "Trespass comprehends an actual physical invasion by tangible matter. An invasion which constitutes a nuisance is usually by intangible substances, such as noises or odors. It usually involves the idea of continuance or recurrence over a considerable period of time. The line of demarcation between private nuisance and trespass is not always clear. Under certain circumstances, such as in some cases involving the flooding of land, there may be both a trespass and a nuisance. In some instances trespasses of continuing character have been dealt with as nuisances." *Ryan v. City of Emmetsburg*, 232 Iowa 600, 4 NW2d 435 (1942).

To be distinguished are the concepts of nuisances and negligence. Negligence is a type of liability-forming conduct. A private nuisance is a tort. It is a substantial and unreasonable interference with the interest of a private person in the use and enjoyment of his land. It has been called a type of harm. Although negligence may accompany the creating of a nuisance, many invasions are intentional, and continuing conduct resulting in continuing or recurrent invasions, after the actor knows the invasions are resulting, is always intentional. Many authorities hold that any unreasonable or unlawful use of property which

unreasonably interferes with the lawful use and enjoyment of other property is an actionable nuisance; that negligence is not an essential or material element of such an action, and that the actor is, as a rule, liable for the resulting injury to others, notwithstanding his exercise of skill and care to avoid such injury. A nuisance may be found to exist even though the person so accused has used the "highest possible degree of care to prevent or minimize the deleterious effects." *Bowman v. Humphrey*, 132 Iowa 234, 109 NW 714 (1906).

By substantially restricting the rights of the Plaintiffs to in the future maintain an action alleging a private nuisance against the farm operators within the approved ag area, the legislature has therefore diminished the Plaintiffs' ability to protect their own interest in the reasonable and peaceable enjoyment of their own real property. It is to be noted, however, that the abrogation is not complete. The protection accorded the Intervenor is available to them unless: (1) A nuisance results from a farm operation determined to be in violation of a Federal statute or State statute or rule; (2) It results from the negligent operation of the farm or farm operation; (3) From an action or proceeding arising from injury or damage to a person or property caused by the farm or farm operation before the creation of the agricultural area; or (4) From a right to recover damages because of the pollution or changing condition of the water of a stream, the overflowing of a person's land, or excessive soil erosion onto another person's land, unless caused by an act of God.

With the foregoing in mind, the Court will now turn to the specific allegations of the Plaintiffs.

#### IOWA CONSTITUTION, ARTICLE I, SECTION I

The Iowa Constitution, Article I, Section I, provides:

All men are, by nature, free and equal, and have certain inalienable rights—among which are those of

enjoying and defending life and liberty, requiring, possessing and protecting property, and pursuing and obtaining safety and happiness.

The Plaintiffs' position, simply stated, is that, without resort to self-help, the remedy, constitutionally provided, and by the common law, to "protect property" is the maintenance of a common law nuisance action, and that the impairment of that right by the legislature is unconstitutional in violation of the quoted section of the Iowa Constitution.

The stated constitutional provision has been before the Iowa Supreme Court in two principal cases cited by the Plaintiffs in support of their proposition.

The first is *State v. Ward*, 170 Iowa 185, 152 NW 501 (1915), where, in an apparent test case, the Defendant Ward shot and killed a deer contrary to statute. The deer was shot while engaged in the consumption of livestock fodder owned by the defendant. He insisted that although the deer was killed contrary to statute, he was entitled to slay the deer in order to protect his property, and the Iowa Supreme Court agreed. Citing Article I, Section I of the Iowa Constitution, the court said: "By way of analogy, we may note that the plea of reasonable self-defense may always be interposed in justification of the killing of a human being. We see no fair reason for holding that the same plea may not be interposed in justification of the killing of a goat or a deer." Accordingly, although the relevant statute prohibiting the killing of deer contained no exception applicable to the defendant, the court by construction found such a right to exist.

Article I, Section I was also before the Court in *May's Drug Stores v. State Tax Commission*, 242 Iowa 319, 45 NW2d 245 (1951). At the time, an Iowa statute made it unlawful to sell cigarettes at less than cost. The plaintiffs contended that among the rights possessed by an owner of property, such as cigarettes, was the right to sell

them at any price the owner might deem best. Rejecting this argument, the court said:

"It is asserted . . . (the statute) . . . violates Section I, Article I of the State constitution which preserves to all men the "inalienable" right of "possessing and protecting property." The argument is that right of the owner to sell property at any price he sees fit is a valuable property right—one that is inherent in property ownership—and the above constitutional provision preserved this right to plaintiff and the act in question seeks to take it away. . . . The property rights preserved by the above constitutional provisions are subject to the higher and greater right known as the public welfare. The property right which is secured by this section of the constitution is the pre-existing common law right, and both this section and the due process clause . . . exclude arbitrary restrictions on property rights."

In *May*, the Supreme Court found the *act* to be constitutional, finding the stated public purpose, the preservation of small independent retailers, was a sufficient public purpose to sustain the act.

The court added: "The police power is an incident of title to private property, and it is no objection to its reasonable exercise if private property is impaired in value or otherwise adversely affected."

Among the secondary authorities cited by the Plaintiffs for the proposition that a common law right to maintain a private nuisance action is part and parcel of the language of Article I, Section I, is a law review article, *Kempkes, the Natural Rights Clause of the Iowa Constitution: When The Law Sits Too Tight*, 42 Drake L. Rev. 593 (1993). The author traces the history of Article I, Section I of the Iowa Constitution, proposes it as a source of individual constitutional rights, independent of other portions of the State and Federal Constitutions, to protect individual rights from "unwarranted governmental inter-

ference." At footnote 21, at page 599, the author concedes: "This Article does not address issues arising out of legislation affecting an individual's economic or property rights, a broad area in which courts have traditionally accorded legislatures wide latitude for experimenting to promote the public welfare." While the Court has read the quoted Article with much interest, given the author's own disclaimer, the Court concludes that any expansive reading to be accorded the same, will have to await action by our highest court.

In summary upon this point, the Court concludes that the challenged legislation does not infringe Article I, Section I of the Iowa Constitution.

#### TAKING FOR PRIVATE USE

The Plaintiffs contend that the challenged legislation affects a taking of their private property solely for the benefit of adjoining land owners in an agricultural area, and not for any purported public use. As such their argument is grounded in the Fifth Amendment to the Federal Constitution and Article I, Section 18 of the Iowa Constitution. The most widely cited Iowa Supreme Court opinion on this topic is *Simpson v. Low-Rent Housing Agency of Mount Ayr*, 224 NW2d 624 (Iowa 1974). The Court there set out certain principles which will now be repeated:

1. The power of eminent domain cannot be utilized for the purpose of taking private property from one person for the private use of another.
2. The power of eminent domain can be exercised only for a public use or purpose.
3. The foregoing propositions are implied from the language of Article I, Section 18 of the Iowa Constitution which provides: "Private property shall not be taken for public use without just compensation."

4. It is for the legislature to initially determine whether condemnation of private property is for a public use.

5. Where the General Assembly declares a use to be public in nature, there exists an attendant presumption of constitutionality with which the judiciary will not interfere unless the purpose is clearly, plainly and manifestly of a private character. Every reasonable intentment must be indulged in favor of a statutory enactment.

6. It is for the courts, however, to ultimately determine whether a taking by eminent domain is for a public purpose when constitutionality of the foundational statute is challenged. The court is not required to treat a legislative declaration of purpose as final, binding or conclusive.

The specific holding in *Simpson* was that statutory authorization for public authorities to condemn private land, and then convey it to a private non-profit corporation to develop subsidized rental apartments was for a public use.

A statutory scheme was adopted in Hawaii in order to end a land oligopoly pursuant to which a public agency would condemn privately held land, and then under the statutory procedure re-sell the land to the private tenants in possession thereof. A challenge to this scheme was mounted under the 5th Amendment to the U.S. Constitution, alleging that the purpose was wholly private: to take land from owner A and convey it to owner B. The 9th Circuit Court of Appeals agreed, but a unanimous U.S. Supreme Court reversed. The court held that the breaking up of this extreme concentration of private land ownership, which had resulted in a gross distortion of market prices in Hawaii, was within the province of the legislature to accomplish and was not a taking for a private use. The court said: "There is of course a role for courts to

play in reviewing a legislature's judgment of what constitutes a public use, even when the eminent domain power is equated with the police power. But the court in *Berman* made clear that it is a frequently "narrow one." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 81 L.Ed.2d 186, 104 S.Ct. 2321 (1984).

Deference to the legislature's public use determination is required until it is shown to involve an impossibility. *Id.* The court added: "But where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the court has never held a compensated taking to be proscribed by the public use clause." The court expressly rejected the proposition that the government must possess and use property at some point during the taking. The mere fact that property was taken by eminent domain and later transferred in the first instance to private beneficiaries does not condemn that taking as having only a private purpose. It is not essential that the entire community, nor even any considerable portion, directly enjoy or participate in any improvement in order for it to constitute a public use. Finally, State legislation like that of Congress, is entitled to judicial deference.

In this case, the gist of the Plaintiffs' argument is that a burden is placed upon the Plaintiffs as neighbors to an ag area which burden is not visited upon the entire community. As such, they say that their property rights (i.e. the maintenance of a private nuisance action) is infringed not for any public benefit but for the private benefit for the land owner within the ag area. However, under the standards enunciated above, the legislature's judgment (that the greater good of all Iowans is served by a robust agricultural economy, and that a certain "freedom to farm" is required in order to foster this goal) is rationally related to a proper public purpose, although private land owners are incidentally benefited by the procedure. The Plaintiffs' argument to the contrary must fail.

TAKING WITHOUT JUST COMPENSATION  
A. PHYSICAL INVASION

As noted above, the state and federal constitutions prohibit the taking of private property for public use without just compensation. The first question is whether a "taking" has occurred, and one method of government "taking" which requires just compensation is a physical invasion of the property of another. Where less than a complete taking is involved, the Court's analysis under the first prong of its takings law is whether the property owner has been required to suffer some physical invasion.

Illustrative of takings cases in which a physical invasion is involved is *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 73 L.Ed.2d 868, 102 S.Ct. 3164 (1982). In *Loretto* a New York statute required a landlord to permit, with one dollar of compensation, the invasion of the landlord's apartment building in order to permit cable television installation for the benefit of the tenants. As it applied to the plaintiff, the landlord was required to permit installation of cable of about one-half inch diameter for approximately 30 feet in length along the top of its building, which invasion would certainly seem to be slight at best. The Supreme Court held, however, that the actual physical invasion by installation of the wires and small connecting boxes, was an actual physical invasion which required just compensation under the 5th Amendment. The court said: "When faced with a constitutional challenge to a permanent physical occupation of real property, this court has invariably found a taking." In its analysis, the U.S. Supreme Court reasoned from "flooding" cases where government action inundated a land owner's property with water. The court noted a clear distinction was drawn between permanent physical occupation, in cases involving a more temporary invasion or government action causing consequential damage within the property of another based on government activity occur-

ring outside the property. The court noted that it has always found a taking only in the case of the permanent invasion.

Applying this analysis to the facts at hand, it is first noted that *Ryan v. City of Emmetsburg*, supra, draws a distinction between physical invasion, characterized as a trespass in *Ryan*, and nuisance which is intangible invasion. In this case, the intangible invasion does not rise to the level of an actual physical occupation such as to constitute a taking. Finding no invasion and therefore no taking, the Court will next turn to the second prong of Supreme Court takings cases.

#### B. REGULATORY TAKING

Although no physical invasion is involved, the Supreme Court has recognized that a taking may occur where regulations are so comprehensive and burdensome as to deprive a private land owner of all economically viable use of property. The Supreme Court recognizes that if the government prohibits all beneficial economic activity upon a parcel of real estate, even though the government does not invade the same, or physically oust the owner from the property, a taking has occurred. In *Nolan v. California Coastal Commission*, 483 U.S. 825, 97 L.Ed.2d 677, 107 S.Ct. 3141 (1987), the Supreme Court held that a California scheme which conditioned a building permit to construct a permanent home on a certain stretch of California beach front upon the owner granting a public easement for use of the beach in front of the property was unconstitutional. Justice Scalia found no connection between the purported purpose of the requirement, to increase access to the sea, to the requirement of the giving of the easement. On the contrary, the Supreme Court found it was actually an authorized physical invasion rather than an appropriate government regulation. While noting that land use regulation does not affect a taking if it "substantially advances

legitimate state interests” and does not “deny an owner economically viable use of his land” if there is no such connection, the taking has occurred which must be compensated. In *First Lutheran Church v. Los Angeles County*, 482 U.S. 304, 96 L.Ed.2d 250, 107 S.Ct. 2378 (1987), the U.S. Supreme Court held that an emergency order entered which prohibited the plaintiff church from operating a campground near a river subject to flooding was a “temporary” taking which required compensation.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 120 L.Ed.2d 798, 112 S.Ct. 2886 (1992), a South Carolina statutory plan authorized creation of a beach front management area which required property owned by the plaintiff to be left free of any permanent structure. As in the above cases, the government made no physical invasion of the plaintiff’s property but it was found the regulations had the effect of destroying all reasonable economic benefit to be gained from the property. The court summarized its holdings: “We think, in short, that there are good reasons for our frequently expressed belief that when the owner of real property has been called upon to sacrifice *all* economically beneficial uses in the name of the common good, that is, to leave his property economically idle, he has suffered a taking.”

Under the teaching of the cases described above, it is quite clear that the statutory procedure alleged in this case which, it may be assumed, may require the Plaintiffs to suffer what they say will be odors generated by farming activities in the agricultural area, assuming lack of negligence and affirmative compliance with State and Federal regulations, is not such as to totally deprive the Plaintiffs of all economically advantageous use of their properties. It is conceivable that a situation could be imagined which might approach such a result, but where the challenge to the statute is upon its face and not as applied in a concrete set of facts, this Court has no difficulty in deter-

mining that a regulatory taking has not occurred. The Supreme Court has been markedly disinclined to find a regulatory taking where only one or two sticks in the "bundle of rights" that are part and parcel of the ownership of real property have been impaired, no regulatory taking has occurred. Thus, in *Yee v. City of Escondido*, 503 U.S. 519, 118 L.Ed.2d 153, 112 S.Ct. 1522 (1992), the Supreme Court approved, over a takings challenge, a California statutory provision which authorized the City of Escondido to regulate rentals in mobile home parks.

In this case, the challenged legislation impairs but does not eliminate one of the many "sticks" in the bundle of rights, and as in *Yee v. Escondido*, above, represents the legislature's judgment in adjusting property rights, but does not amount to a taking. The Plaintiffs' claim to the contrary fails.

#### PROCEDURAL DUE PROCESS

The plaintiffs contend that they were deprived of procedural due process in the course of the process outlined in the Statement of Facts above. As appears below, the Court has determined that in approving the agricultural area designation, the board of supervisors was acting in a legislative capacity. This finding compels the conclusion that due process was served by the statutorily required comment-argument type hearing which was conducted in this case. *Montgomery v. Bremer County Board of Supervisors*, 299 N.W.2d 687 (Iowa 1980).

#### NUISANCE VERSUS FIFTH AMENDMENT TAKING

The foregoing discussion amply demonstrates that the partial statutory abrogation of an adjoining landowner's right to bring a common law nuisance suit against a farmer operating within an ag area does not by any means fit neatly within traditional, well-defined methods of analysis for Fifth Amendment takings. Indeed the Court has

determined that none directly apply. As appears below, it is said to be the majority rule that the legislature cannot authorize the maintenance of a nuisance without compensation. The Court will below examine authorities so saying in some detail.

58 Am Jur2d *Nuisances* Section 462 *et. seq.* (1989), discusses the extent to which legislative authorization may constitute a defense in a suit alleging the maintenance of a private nuisance. Section 463 provides in part:

The legislature, generally, may legalize, insofar as the public is concerned, what would otherwise be a public nuisance, and, according to some courts, may legalize what would otherwise be private nuisances, so as to prevent the recovery of damages or relief by way of injunction on account of them, although the weight of authority is to the contrary.

Section 464 elaborates on the foregoing and provides:

The state has power to legalize, insofar as the public is concerned, what would otherwise be a public nuisance, and within constitutional limitations it may make lawful things that were nuisances, even though, by doing so, the use or value of the property is affected.

Section 465, while acknowledging a minority rule to the contrary, says:

According to the weight of authority, however, what is authorized by law may be a private nuisance, and the legislative authorization in this regard does not affect any claim of a private citizen for damages for any special inconvenience and discomfort caused by the authorized act not experienced by the public at large, or for an injunction.

Furthermore, under constitutional provisions against the taking of damaging of private property without compensation, the legislature cannot authorize the

maintenance of a nuisance without compensation to individuals whose property is destroyed or injured thereby, and legislative authority will not exempt the person to whom it is granted from liability for such compensation.

Section 466 provides generally that where statutory exemption or immunity from maintenance of a nuisance cause of action is granted, the granting of immunity is strictly construed. Further, it is not presumed the legislature intended to authorize the creation of the nuisance, unless the offensive conduct is the natural and necessary result of an exercise of the power conferred. Section 467 elaborates on the foregoing and says that the granting of government permits, including zoning permits, will not be construed as an authorization for the creation of a nuisance, nor immunize the same. Section 469 is essentially the same affect.

26 Am Jur2d *Eminent Domain* Section 145 (1996), provides in part:

Thus, property is taken by the government in the sense of the provision of the Fifth Amendment . . . when inroads are made upon an owner's use of it to an extent that as between private parties, a servitude has been acquired either by agreement or in course of time.

Later:

Thus, a taking of property for which compensation must be paid may not require an actual physical taking or appropriation of the fee simple, but may consist of an interference with the rights of ownership, use, and enjoyment, or any other rights incident to property.

Among the authorities cited for the latter proposition is *Hunziker v. State*, 519 NW2d 367 (Iowa 1994).

Iowa law appears to conform to much of the foregoing. In *State v. Moffett*, 1 Iowa (Greene) 247 (1848), the defendant and others were indicted for damaging a mill dam. The defense was that the existence of the dam caused ponding of water which injured the defendant's own water wheel, that the dam thus created a nuisance, which the defendant had a common law right to abate. The statute under which the defendants were charged made it illegal to injure a mill dam, and the prosecution claimed that the criminal statute abrogated the defendant's common law right to abate the nuisance. The Supreme Court concluded:

There is nothing in our statute, express or implied, excluding remedies which existed before the statute was passed. One of these remedies was abatement of a nuisance; and in the absence of a statute taking this remedy away, it remained preserved. (emphasis supplied).

It thus appears that the court in *Moffett* was merely holding that the criminal statute did not abrogate the right to abate the nuisance, its holding being qualified that "in the absence of a statute taking this remedy away" the remedy remained.

In *Miller v. City of Webster City*, 94 Iowa 162 (1895), the plaintiff sought abatement of a city market created by the city pursuant to statute, where livestock was brought to be weighed and traded. The market area was across the street from the plaintiff's residence. He complained of the odor, noise, dust and the like generated by the animals so confined. The Supreme Court noted that the market was placed under the authority of statute, and said:

Being so authorized they are not public nuisances; for the rule, as we understand it, is where a municipal corporation is authorized to do a particular thing, so long as it keeps within the scope of the power

granted, it is protected from proceedings on behalf of the public, subject possibly to this qualification that the nuisance, if any, arises as a natural and probable result of the act authorized, so that it may fairly be said to be covered, in legal contemplation, by the legislation conferring the power. If the nuisance is not the necessary result of the act authorized, or if it might be exercised in such a manner as to obviate the nuisance, legislative authority will not be inferred from the grant, to create the nuisance, and it will not bar proceedings to abate it.

In *Payne v. Town of Wayland*, 131 Iowa 659 (1906), the plaintiff sought to enjoin the city from using certain property as a cemetery. The court discussed the fact that the city was authorized by statute to establish and maintain a cemetery, and said:

We need not now discuss the power of the legislature to itself create, or to authorize another to create, a private nuisance without compensation to the injured party; for it is evident that no such power is conferred by our statute.

The Iowa Supreme Court appears not yet to have answered the question left open in the *Payne* decision.

The foregoing demonstrates, however, that our State appears to be in the mainstream as described in the American Jurisprudence citations noted above.

In *Baltimore and Potomac R.R. Co. v. Fifth Baptist Church*, 27 L.Ed. 739, 108 U.S. 317, 2 S.C. 719 (1882), the church brought suit for damages caused by the dust, smoke and noise generated by the railroad company's engine house and repair shop. The facility had been located under grant of authority from Congress and claimed this as a defense. The Supreme Court held that the grant of authority was "no answer to the action of the plaintiff," saying: "It admits indeed of grave doubt whether Congress

could authorize the company to occupy and use any premises within the city limits, in a way which would subject others to physical discomfort and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the company from liability to sue for damages or compensation, to which individuals acting without such authority would be subject under like circumstances. Without expressing any opinion on this point, it is sufficient to observe that such authority would not justify an invasion of others property to an extent which would amount to an entire deprivation of its use and enjoyment, without compensation to the owner. Nor could such authority be invoked to justify acts, creating physical discomfort and annoyance to others in the use and enjoyment of their property, to a less extent than entire deprivation if different places from those occupied could be used by the corporation for its purposes, without causing such discomfort and annoyances."

Thus, while appearing to state an absolute rule, where the deprivation is less than a taking of the whole, the court entered into a consideration of whether alternate means and methods could have been employed which would not have caused the discomfort and annoyance.

Later, in *Richards v. Washington Terminal Co.*, 233 U.S. 546, 58 L.Ed 1088, 34 S.Ct. 654 (1914), the plaintiff brought suit against the defendant for smoke, dust, noise and vibration caused by the operation of the railroad through a tunnel which opened near the plaintiff's property. The court distinguished British authority and said:

"We deem the true rule under the Fifth Amendment, as under State constitutions containing a similar prohibition, to be that while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking of private property for public use.

Thereafter, the court posed this question "what is to be deemed a private nuisance such as amounts to a taking of property?" The answer was that railroads are not to be subject to damages "in the absence of negligence." Thus, while appearing to state an absolute rule, the court examined the record looking for negligence, and reversed a judgment rendered for the plaintiff and remanded for an allocation of damages purely the result of negligence, while disallowing damages naturally incident to the operation of the railroad.

Other cases relied upon by the American Jurisprudence editors to support what is said to be the majority rule as described in Section 465, and discussed above, while appearing to state an absolute rule each are based upon a finding of either negligence, improper siting, or are dicta. *Yaffe v. Ft. Smith* 178 Ark, 406, 10 SW2d 886, 61 A.L.R. 1138 (1928); *Steele v. Queen City Broadcasting Company*, 341 P2d 499 (Wash. 1959). In *Yaffe*, there was evidence of negligent and improper operation of a junk yard which was found to be a nuisance and in *Steele* the court's statement was dicta, as the court found that the government authority to build the offending television tower was improperly granted.

Some courts have disregarded the foregoing authorities completely and have held flatly that a facility or activity authorized by Congress or a Federal instrumentality cannot constitute a nuisance at all. *Potomac River Association, Inc. v. Lundberg Maryland Seamanship School, Inc.*, 402 F.Supp. 344 (D.Maryland 1975) ("the corps may immunize acts which would otherwise be nuisances in much the same way as zoning under a state's police power may cause some curtailment of rights by restricting uses"; corps of engineers authorized defendant to dredge and fill land along a navigable creek to plaintiff's damage.); *State of Mo. Ex. Rel. Ashcroft v. Dept. of Army, Etc.*, 526 F.Supp. 660 (WD Mo, 1980) ("the court will not hold conduct to constitute a nuisance where authority

therefore exists by virtue of legislative enactment." Hydro-electric plant not a nuisance).

In *McMahon v. City of Dubuque*, 255 F.2d 154 (8th Cir., 1958), an allegation that the exercise of zoning powers operated as a taking, the court noted: "Every zoning regulation affects property already owned by individuals and causes some curtailment of the rights of such owners by restricting prospective uses. Thus it may be said to lay an uncompensated burden upon some property owners. However, this is not regarded as depriving the owner of his property or such use of it as he may desire to make. It is merely a restraint upon the use of it for the protection of the general well-being, that is, to prevent harm to the public." *Id.* at 160.

In analyzing the foregoing, it appears that while the pending dispute is unique, counsel having cited no cases on point and the Court's own research revealing none, it is far from unknown in Iowa and American jurisprudence that legislature or congress may determine that a facility or activity is so important for the general public good that some detriment and burden by affected property owners must be borne by them, uncompensated.

The legislative declaration contained in Section 352.1, Code of Iowa (1995) recognizing the importance of agriculture in the Iowa economy conforms with the view judicially noted by the Iowa Supreme Court that agriculture is our "leading industry". *Benschoter v. Hakes*, 232 Iowa 1354, 8 NW2d 481 (1943).

A common thread running through the cases cited above and cases read but not cited by this Court is that certain public improvements and activities are so important that they simply must occur. The analysis given is often focused upon whether the given facility or activity was improperly placed, or was negligently operated, and under this analysis, a wide variety of important commercial activities, invested with substantial public interest, have

been permitted to occur, although adjoining neighbors might suffer thereby. These have included oil refineries, railroad tracks, railroad repair yards, hydroelectric dams, levies, television towers and the like. Given the legislative and judicial recognition of the importance of agriculture in our economy, farming activities including livestock production must be included with the foregoing.

As noted first above, the Plaintiffs make a facial attack against Section 352.11. The foregoing discussion makes clear that the facial attack, under the standard of analysis described first above, must fail. Whether the operation of a farming enterprise in an agricultural area in the future, absent negligence and in conformity with State and Federal environmental regulations could rise, as applied, to a nuisance and a "taking" under the Fifth Amendment, cannot now be decided.

#### RES JUDICATA

With the constitutional objections to the mentioned statute resolved, the Court now turns to the non-constitutional arguments advanced by the Plaintiffs and first addresses the claim that the November, 1994 denial of the ag area designation by the board is res judicata.

The plaintiffs correctly say that the doctrine of res judicata may apply to a tribunal, not a court, which exercises judicial functions. The doctrine of res judicata serves the salutary purpose of preventing repetitive litigation over issues which have previously been finally determined by a judicial or quasi-judicial body. It means "the thing is decided." It is applicable to an administrative adjudication if and only if the performing officer or body is acting in a quasi-judicial capacity. *Board of Supervisors, Carroll County v. Chicago & Northwest Transp. Co.*, 260 NW2d 813 (Iowa 1977).

In a closely analogous proceeding involving a rezoning request, the Supreme Court held that while under a county or city zoning procedure, the board of adjustment is a

quasi-judicial body, in considering a rezoning request or an amendment to a zoning ordinance, the board of supervisors or city council sits not in a judicial capacity but in a legislative capacity. *Montgomery v. Bremer County Board of Supervisors*, 299 NW2d 687 (Iowa 1980). In this case, the board of supervisors is statutorily required to conduct a comment-argument type of hearing of which the public is required to have advance notice. Like the board in *Montgomery*, however, the hearing here did not include cross-examination, evidence was not taken under oath, and the Court concludes that the Board was acting in a legislative and not a quasi-judicial capacity in passing upon the ag area petition. Since the Board of Supervisors was not acting in a quasi-judicial capacity, it follows the principles of res judicata do not apply.

#### ARBITRARY AND CAPRICIOUS

“A writ of certiorari shall only be granted when specifically authorized by statute; or where an inferior tribunal, board or officer, exercising judicial functions, is alleged to have exceeded its, or his proper jurisdiction or otherwise acted illegally.” Iowa Rule of Civil Procedure 306; *Frank Hardy Advertising, Inc. v. City of Dubuque Zoning Board of Adjustment*, 501 NW2d 521, 523 (Iowa 1993). “In certiorari it is neither the function nor the privilege of the court to pass upon the wisdom or soundness of an inferior tribunal’s discretion, but its review is restricted to jurisdiction and legality.” *Smith v. City of Fort Dodge*, 160 NW 2d 492, 498 (Iowa 1968). An illegality is established if the inferior tribunal has not acted in accordance with a statute, if its decision was not supported by substantial evidence, or if its actions were unreasonable, arbitrary, or capricious. *Asmann v. Board of Trustees of Police Retirement Sys.*, 345 NW2d 136, 138 (Iowa 1984). The plaintiff in a certiorari action challenging the action was illegal. *Norland v. Worth County Compensation Board*, 323 NW2d 251, 252 (Iowa 1982). A finding of “illegality” as described above does not require or suggest a finding

that the board or its members acted in bad faith. It is merely the word chosen by the law to describe the circumstance in which the particular tribunal's action cannot be permitted to stand. The Iowa Supreme Court has observed:

"(It) does not imply a bad motive, or a wrongful purpose or perversity, passion, prejudice, partiality, moral delinquency, willful misconduct or intentional wrong. We shall not undertake to formulate a general definition of the term 'abuse of discretion'. It does not imply reproach."

In this case one Board member indicated he voted affirmatively in favor of the establishment of the agricultural area after having weighed the arguments and found them to be equal, he flipped a coin. Another Supervisor analogized with the granting of a driver's license, and felt that the Board had no discretion to permit or deny the establishment of an agricultural area so long as the application was in proper form, the Board was compelled to approve it.

The Attorney General has ruled, however, that the Board does have discretion to consider whether in the words of the statute, the establishment of an agricultural area would be inconsistent with the purposes of this chapter with reference to the statement of purposes contained in Section 352.1. The Attorney General has ruled, correctly in the opinion of this Court, that the Board does have discretion to reject a proposed agricultural area upon a specific finding that the policy in favor of agricultural land preservation is in a given case outweighed by other policy considerations set forth in the chapter. Opinion of the Attorney General (Weeg to Beine, Cedar County Attorney, February 9, 1983) Opinion No. 83-2-5. The words of Section 352.7(2) say the Board "shall adopt" the proposal or any modification "unless to do so would be inconsistent with the purposes of this chapter." The foregoing

language obviously invests the Board with discretion, and also imposes a duty to make appropriate inquiry at the hearing as to whether the "purposes of the act" are served or not served by granting the petition. Although speaking in a different context, in reference to judicial discretion, the Supreme Court has said that that discretion must be exercised. A prominent Iowa judge has said: "When the trial court has discretion, the judge must recognize and exercise it, and failure to do either is reviewable." Fagg, *A Judge's View of Trial Practice*, 28 Drake L.Rev. 1 (1978-79).

The Supreme Court has said:

A refusal or failure to exercise discretion will not be affirmed by demonstrating that the result reached could have been the same upon the exercise of the withheld discretion (citation is omitted) because the trial court had discretion to either allow or disallow the motion for production it was required to exercise it. The duty to exercise discretion was not discharged. *Sullivan v. Chicago & Northwestern Transportation Co.*, 326 N.W.2d 320 (Iowa 1982).

See also *State v. Hildebrand*, 280 N.W.2d 393 (Iowa 1979).

While the Court is sympathetic to the position of the Board of Supervisors, and is somewhat inclined to believe that the Supervisor who says he "flipped a nickel" was being facetious, the Court cannot ignore nor sanction public action decided by chance. That is the very definition of "capricious". Further, the act appears to vest discretion in the Board and require its prudent exercise. To falsely believe that one has no discretion is also arbitrary and capricious. The action of the Board must be annulled and this matter remanded to be considered again by the Board, after proper statutory notice, guided by this opinion, and that of the Attorney General.

## SUMMARY

The Court summarizes its Findings as follows:

1. Section 352.11 is not unconstitutional in violation of Article I, Section I of the Iowa Constitution.
2. Although finding that no taking has occurred, the Court finds and concludes that any taking that has occurred is for a public use and not a private use.
3. No physical taking without just compensation has occurred and Section 352.11 does not therefore violate the Fifth Amendment proscription.
4. No regulatory taking has occurred in violation of the Fifth Amendment prohibition.
5. The hearing contemplated by Section 352.11 provided appropriate procedural due process.
6. In passing upon the agricultural area petition, the Board acted in a legislative and not quasi-judicial capacity and subsequent action after prior disapproval is not barred by the doctrine of res judicata.
7. The votes of two Supervisors were accompanied by such error or infirmity that the final Board action approving the agricultural area in question here is arbitrary and capricious and must therefore be annulled.

## JUDGMENT

IT IS THE ORDER, JUDGMENT AND DECREE of the Court as follows:

1. The foregoing summary of Findings is herein incorporated by this reference.
2. The writ of certiorari is sustained in that the error or infirmity in the Board's action has been demonstrated, and this matter must be and is hereby **ORDERED** remanded to the Kossuth County Board of Supervisors for further proceedings as provided by law.

3. The costs of this action to be taxed by the Clerk in the sum of \$115.00 are hereby taxed against and shall be paid by the Defendants.

SO ORDERED this 30th day of July, 1996.

/s/ Patrick M. Carr  
PATRICK M. CARR, Judge  
Third Judicial District of Iowa

APPENDIX C

[Filed Dec. 2, 1996]

IN THE IOWA DISTRICT COURT  
FOR KOSSUTH COUNTY

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Law No. 23313

CLARENCE BORMANN and CAROLINE BORMANN, Husband  
and Wife; LEONARD MCGUIRE (deceased) and CECELIA  
MCGUIRE, Husband and Wife,

*Plaintiffs,*

-vs-

THE BOARD OF SUPERVISORS IN AND FOR KOSSUTH  
COUNTY, IOWA, and JOE RAHM, AL DUDDING, LAUREL  
FANTZ, JAMES BLACK and DONALD MCGREGOR, In  
their Capacities as Members of the Board of Super-  
visors,

*Defendants.*

GERALD GIRRES, JOAN GIRRES, MIKE GIRRES, NORMA  
JEAN THUL, JERALD THILGES, SHIRLEY THILGES,  
THELMA THILGES, EDWIN REDING, RALPH REDING,  
LORETTA REDING, BERNARD THILGES, JACOB THILGES,  
JOHN GOECKE, and PATRICIA GOECKE,

*Intervenors.*

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ORDER OF COURT UPON RULE 179(b) MOTION

On July 31, 1996, the Court filed its Findings, Con-  
clusions and Judgment in the above proceeding. On  
August 8, 1996, the Plaintiffs filed a Motion for Enlarge-  
ment, Amendment, Modification, Or Substitution of Con-  
clusions under I.R.C.P. 179(b). At the suggestion of  
counsel, the Court deferred ruling on the same in anticipa-

tion of the receipt of an opinion by the Iowa Supreme Court in *Weinhold v. Wolff*, — NW(2) — (Iowa 1996) (Supreme Court No. 94-1589, filed October 23, 1996). That opinion has now been received and considered. The opinion contains language capable of supporting the position of each party, but the language noted is not central to the Court's opinion. The Court has also received and studied the Plaintiffs' memorandum. Deeming itself fully advised the Court enters the following order.

It should be first stated that the issues framed by the pleadings in this case presented novel, difficult and close issues for judicial determination, which the parties have vigorously and ably contested. The Court's Judgment filed July 31, 1996 represented its best judgment as to the issues thus presented. With this in mind, the Court turns to the two specific issues raised by the Plaintiffs' motion.

## I

The Plaintiffs' first inquiry questions the harmony of the Court's reading of the *May's Drug Stores v. State Tax Commission*, 242 Iowa 319, 45 NW(2) 245 (1951), and *State v. Ward*, 170 Iowa 185, 152 NW 501 (1915). Simply stated, the Court was unable to extrapolate from *State v. Ward* the proposition for which it was cited, that the legislature may not constitutionally limit a property owner's right to bring a common law nuisance action. The Court concludes that the fact-based decisions in *Baltimore and Potomac R.R. Co. v. Fifth Baptist Church*, 108 U.S. 317 (1882) and *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914), rested, as did the legislative determination in enacting the statute under attack, upon an inquiry weighing the burden visited upon adjacent owners against the negligent siting and operation of the offending improvements. The Court concluded that this requires an ad hoc, fact-based inquiry not capable of determination in this proceeding.

## II

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the statutory scheme found unconstitutional required the property owner affected to suffer a physical invasion of his property as a condition of receiving a building permit. In this case, the physical invasion is not required or authorized. The Iowa Supreme Court has drawn this distinction. *Ryan v. City of Emmetsburg*, 232 Iowa 600, 4 NW(2) 435 (1942). The Plaintiffs again draw the Court's attention to *Churchill v. Burlington Water Company*, 94 Iowa 89, 62 N.W. 646 (1895). They argue with some logic that the uncompensated taking of an easement which would authorize a physical invasion as in *Nollan* is not much different from the effect of the statute *sub judice* which they say requires adjoining property owners to give an uncompensated nuisance or "pollution" easement. The distinction is indeed thin. Given the strong presumption of constitutionality accorded legislative enactments, and in light of the similar distinction drawn by the Supreme Court in such cases as *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the court is constrained to find the statute constitutional upon facial attack.

Based on the foregoing, IT IS ORDERED that the Rule 179(b) Motion is hereby overruled as to each asserted ground.

SO ORDERED this 30th day of November, 1996.

/s/ Patrick M. Carr

PATRICK M. CARR, Judge

Third Judicial District of Iowa

## APPENDIX D

### KOSSUTH COUNTY BOARD OF SUPERVISORS

On February 7, 1995, a Ag Area Petition was filed with the Kossuth County Board of Supervisors, heard by public hearing on the 14th day of March 1995, and approved. An appeal was taken, the Iowa District Court in its Findings, Conclusions and Judgement, stated the previous action of the Board of Supervisors must be annulled, and this matter remanded to be considered again by the Board, after proper statutory notice, guided by this opinion, and that of the Attorney General. On September 3rd, 1996, pursuant to Iowa Code Section 352.7(1), after the required public notice, the Board of Supervisors held a public hearing on this petition and received public comment.

The Board finds that the petition to create the agricultural area complies with Iowa Code Section 352.6 and that adoption of the proposed agricultural area is consistent with the purposes of Chapter 352. Therefore, on September 3, 1996, the County Board of Supervisors, on a motion made and seconded, adopts the following described agricultural area.

Property owners: Gerald & Joan Girres, Mike Girres, Norma Jean Thul, Jerald J. & Shirley B. Thilges, Thelma & Edwin Thilges, Ralph & Loretta Reding, Bernard H. Thilges, Jacob Thilges, Patricia A. & John E. Goecke  
Size: 960 acres, more or less.

Legal Description attached hereto.

Description of Boundaries: Riverdale Twp. as more particularly shown on the attached map, incorporated herein by reference.

164a

September 3, 1996

/s/ Joe Rahm  
JOE RAHM, Chairman  
Kossuth County  
Board of Supervisors

September 3, 1996

/s/ Delores Dodds Thilges  
DELORES DODDS THILGES  
Kossuth County Auditor

## APPENDIX E

## STATUTORY PROVISIONS INVOLVED

COUNTY LAND PRESERVATION  
AND USE COMMISSIONS**352.1 Purpose.**

It is the intent of the general assembly and the policy of this state to provide for the orderly use and development of land and related natural resources in Iowa for residential, commercial, industrial, and recreational purposes, preserve private property rights, protect natural and historic resources and fragile ecosystem of this state including forests, wetlands, rivers, streams, lakes and their shorelines, aquifers, prairies, and recreational areas to promote the efficient use and conservation of energy resources, to promote the creation and maintenance of wildlife habitat, to consider the protection of soil from wind and water erosion and preserve the availability and use agricultural land for agricultural production, through processes that emphasize the participation of citizens and local governments.

The general assembly recognizes the importance of preserving the state's finite supply of agricultural land. Conversion of farmland to urban development, and other nonfarm uses, reduces future food production capabilities and may ultimately undermine agriculture as a major economic activity in Iowa.

It is the intent of the general assembly to provide local citizens and local governments the means by which agricultural land may be protected from nonagricultural development pressures. This may be accomplished by the creation of county land preservation and use plans and policies, adoption of an agricultural land preservation ordinance, or establishment of agricultural areas in which substantial agricultural activities are encouraged, so that

land inside these areas or subject to those ordinances is conserved for the production of food, fiber, and livestock, thus assuring the preservation of agriculture as a major factor in the economy of this state.

### **352.2 Definitions.**

As used in this chapter unless the context otherwise requires:

1. "*Agricultural area*" means an area meeting the qualifications of section 352.6 and designated under section 352.7.
2. "*County board*" means the county board of supervisors.
3. "*County commission*" mean the county land preservation and use commission.
4. "*Farm*" means the land, buildings, and machinery used in the commercial production of farm products.
5. "*Farmland*" means those parcels of land suitable for the production of farm products.
6. "*Farm operation*" means a condition of activity which occurs on a farm in connection with the production of farm products and includes but is not limited to the raising, harvesting, drying, or storage of crops; the care or feeding of livestock; the handling or transportation of crops or livestock; the treatment or disposal of wastes resulting from livestock; the marketing of products at roadside stands or farm markets; the creation of noise, odor, dust, or fumes; the operation of machinery and irrigation pumps; ground and aerial seeding and spraying; the application of chemical fertilizers, conditioners, insecticides, pesticides, and herbicides; and the employment and use of labor.
7. "*Farm products*" means those plants and animals and their products which are useful to people and includes

but is not limited to forages and sod crops, grains and feed crops, dairy and dairy products, poultry and poultry products, livestock, fruits, vegetables, flowers, seeds, grasses, trees, fish, honey, and other similar products, or any other plant, animal, or plant or animal product which supplies people with food, feed, fiber, or fur.

8. "*Livestock*" means the same as defined in section 267.1.

9. "*Nuisance*" means a public or private nuisance as defined either by statute, administrative rule, ordinance, or the common law.

10. "*Nuisance action or proceeding*" means an action, claim or proceeding, whether brought at law, in equity, or as an administrative proceeding, which is based on nuisance.

\* \* \* \*

### **352.6 Creation or expansion of agricultural areas.**

An owner of farmland may submit a proposal to the county board for the creation or expansion of an agricultural area within the county. An agricultural area, at its creation, shall include at least three hundred acres of farmland; however, a smaller area may be created if the farmland is adjacent to farmland subject to an agricultural land preservation ordinance pursuant to section 335.27 or adjacent to land located within an existing agricultural area. The proposal shall include a description of the proposed area to be created or expanded, including its boundaries. The territory shall be as compact and as nearly adjacent as feasible. Land shall not be included in an agricultural area without the consent of the owner. Agricultural areas shall not exist within the corporate limits of a city. The county board may consult with the department of natural resources when creating or expanding an agricultural area contiguous to a location which is under the direct super-

vision of the department, including a state park, state preserve, state recreation area, or sovereign lake. Agricultural areas may be created in a county which has adopted zoning ordinances. Except as provided in this section, the use of the land in agricultural areas is limited to farm operations.

1. The following shall be permitted in an agricultural area:

*a.* Residences constructed for occupation by a person engaged in farming or in a family farm operation. Non-conforming preexisting residences may be continued in residential use.

*b.* Property of a telephone company, city utility as defined in Section 390.1, public utility as defined in section 476.1, or pipeline company as defined in section 479.2.

2. The county board of supervisors may permit any use not listed in subsection 1 in an agricultural area only if it finds all of the following:

*a.* The use is not inconsistent with the purposes set forth in section 352.1.

*b.* The use does not interfere seriously with farm operations within the area.

*c.* The use does not materially alter the stability of the overall land use pattern in the area.

### **352.7 Duties of county board.**

1. Within thirty days of receipt of a proposal to create or expand an agricultural area which meets the statutory requirements, the county board shall provide notice of the proposal by publishing notice in a newspaper of general circulation in the county. Within forty-five days after receipt of the proposal, the county board shall hold a public hearing on the proposal.

2. Within sixty days after receipt, the county board shall adopt the proposal or any modification of the proposal it deems appropriate, unless to do so would be inconsistent with the purposes of this chapter.

**352.8 Requirement that description of agricultural areas be filed with the county.**

Upon the creation or expansion of an agricultural area, its description shall be filed by the county board with the county auditor and placed on record with the recording officer in the county.

**352.9 Withdrawal.**

At any time after three years from the date of creation of an agricultural area, an owner may withdraw from an agricultural area by filing with the county board a request for withdrawal containing a legal description of the land to be withdrawn and a statement of the reasons for the withdrawal. The county board shall, within sixty days of receipt of the request, approve or deny the request for withdrawal. At any time after six years from the date of creation of an agricultural area, an owner may withdraw from an agricultural area by filing with the county board a notice of withdrawal containing a legal description of the land to be withdrawn.

The board shall cause the description of that agricultural area filed with the county auditor and recording officer in the county to be modified to reflect any withdrawal. Withdrawal shall be effective on the date of recording. The agricultural area from which the land is withdrawn shall continue in existence even if smaller than three hundred acres after withdrawal.

\* \* \* \*

**352.11 Incentives for agricultural land preservation—  
payment of costs and fees in nuisance actions.**

1. *Nuisance restriction.*

*a.* A farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date or expansion of the agricultural activities of the farm or farm operation. This paragraph shall apply to a farm operation conducted within an agricultural area for six years following the exclusion of land within an agricultural area other than by withdrawal as provided in section 352.9.

*b.* Paragraph "a" does not apply to a nuisance which is the result of a farm operation determined to be in violation of a federal statute or regulation or state statute or rule. Paragraph "a" does not apply if the nuisance results from the negligent operation of the farm or farm operation. Paragraph "a" does not apply to actions or proceedings arising from injury or damage to a person or property caused by the farm or a farm operation before the creation of the agricultural area. Paragraph "a" does not affect or defeat the right of a person to recover damages for an injury or damage sustained by the person because of the pollution or change in condition of the waters of a stream, the overflowing of the person's land, or excessive soil erosion onto another person's land, unless the injury or damage is caused by an act of God.

*c.* A person shall not bring an action or proceeding based on a claim of nuisance arising from a farm operation unless the person proceeds with mediation as provided in chapter 654B.

*d.* If a defendant is a prevailing party in an action or proceeding based on a claim of nuisance and arising from a farm operation conducted on farmland within an agricultural area, the plaintiff shall pay court costs and rea-

sonable attorney fees incurred by the defendant, if the court determines that the claim is frivolous.

2. *Water priority.* In the application of a permit to divert, store, or withdraw water and in the allocation of available water resources under a water permit system, the department of natural resources shall give priority to the use of water resources by a farm or farm operation, exclusive of irrigation, located in an agricultural area over all other uses except the competing uses of water for ordinary household purposes.

### **352.12 State regulation.**

In order to accomplish the purposes set forth in section 352.1, a rule adopted by a state agency after July 1, 1982 which would restrict or regulate farms or farm operations may contain standards which are less restrictive for farms or farm operations inside an agricultural area than for farms or farm operations outside such an area. A rule containing such a discrimination shall not for the fact of such discrimination alone be found or held to be unreasonable, arbitrary, capricious, beyond the authority delegated to the agency, or characterized by an abuse of discretion.

## APPENDIX F

State Right-to-Farm Laws  
Nuisance Defenses

State	Provision Parallel To Iowa Code § 352.11
Alabama	Ala. Code § 6-5-127
Alaska	Alaska Stat. § 09.45.235
Arizona	Ariz. Rev. Stat. § 3-112
Arkansas	Ark. Code Ann. § 2-4-107
California	Cal. Civ. Code §§ 3482.5-.6
Colorado	Colo. Stat. § 35-3.5-102
Connecticut	Conn. Gen. Stat. Ann. § 19a-341
Delaware	Del. Code tit. 3, § 1401
Florida	Fla. Stat. Ann. § 823.14
Georgia	Ga. Code Ann. § 41-1-7
Hawaii	Haw. Rev. Stat. Ann. § 165-4
Idaho	Idaho Code §§ 22-4503 to -4504
Illinois	740 Ill. Comp. Stat. 70/3
Indiana	Ind. Code Ann. § 34-19-1-4
Kansas	Kan. Stat. §§ 2-3202, 47-1505
Kentucky	Ky. Rev. Stat. Ann. § 413.072
Louisiana	La. Rev. Stat. Ann. § 3:3603
Maine	Me. Rev. Stat. tit. 17, § 2805
Maryland	Md. Code Ann., Cts. & Jud. Proc. § 5-403
Massachusetts	Mass. Gen. Laws ch. 243, § 6
Michigan	Mich. Comp. Laws § 286.473
Minnesota	Minn. Stat. Ann. § 561.19
Mississippi	Miss. Code Ann. § 95-3-29
Missouri	Mo. Rev. Stat. § 537.295

State	Provision Parallel To Iowa Code § 352.11
Montana	Mont. Code Ann. § 27-30-101
Nebraska	Neb. Rev. Stat. § 2-4403
Nevada	Nev. Rev. Stat. § 40.140
New Hampshire	N.H. Rev. Stat. Ann. §§ 432:33-:34
New Jersey	N.J. Stat. § 4:1C-10
New Mexico	N.M. Stat. Ann. § 47-9-3
New York	N.Y. Agric. & Mkts. Law § 308
North Carolina	N.C. Gen. Stat. § 106-701
North Dakota	N.D. Cent. Code § 42-04-02
Ohio	Ohio Rev. Code Ann. § 929.04
Oklahoma	Okla. Stat. Ann. tit. 2, § 9-210 Okla. Stat. Ann. tit. 50, § 1.1
Oregon	Or. Rev. Stat. §§ 30.936-.937
Pennsylvania	3 Pa. Cons. Stat. Ann. §§ 911, 954
Rhode Island	R.I. Gen. Laws § 2-23-5
South Carolina	S.C. Code § 46-45-30
South Dakota	S.D. Codified Laws §§ 21-10-25.2, -4 to -6
Tennessee	Tenn. Code Ann. §§ 43-26-103, 44-18-102
Texas	Tex. Agric. Code Ann. § 251.004-.006
Utah	Utah Code Ann. § 78-38-7
Vermont	Vt. Stat. Ann. tit. 12, § 5753
Virginia	Va. Code § 3.1-22.29
Washington	Wash. Rev. Code Ann. § 7.48.305
West Virginia	W. Va. Code § 19-19-4
Wisconsin	Wis. Stat. Ann. § 823.08
Wyoming	Wyo. Stat. §§ 11-39-102, -103, 11-44-103